

# Indiana Law Review



Volume 39 No. 3 2006

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SCHOOLHOUSE: RELIGIOUS EXPRESSION IN  
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***FRIDAY, SEPTEMBER 29, 2006***  
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The 2006 Program on Law and State Government Fellowship Symposium and the 2007 *Indiana Law Review* Symposium Edition will focus on an aspect of state law interwoven with America's religious and political history: the many ways states express religious ideas and messages in the public sphere. From state house grounds to schoolhouse classrooms, policy makers and educators grapple with an important yet sensitive issue—how to recognize the importance of religion while upholding the separation of church and state. From religious displays on public grounds to debates about incorporating the theory of intelligent design into public classroom science courses, state government decisions of religious expression become the subjects of public debate, state legislation, litigation, and, sometimes, front page headlines.

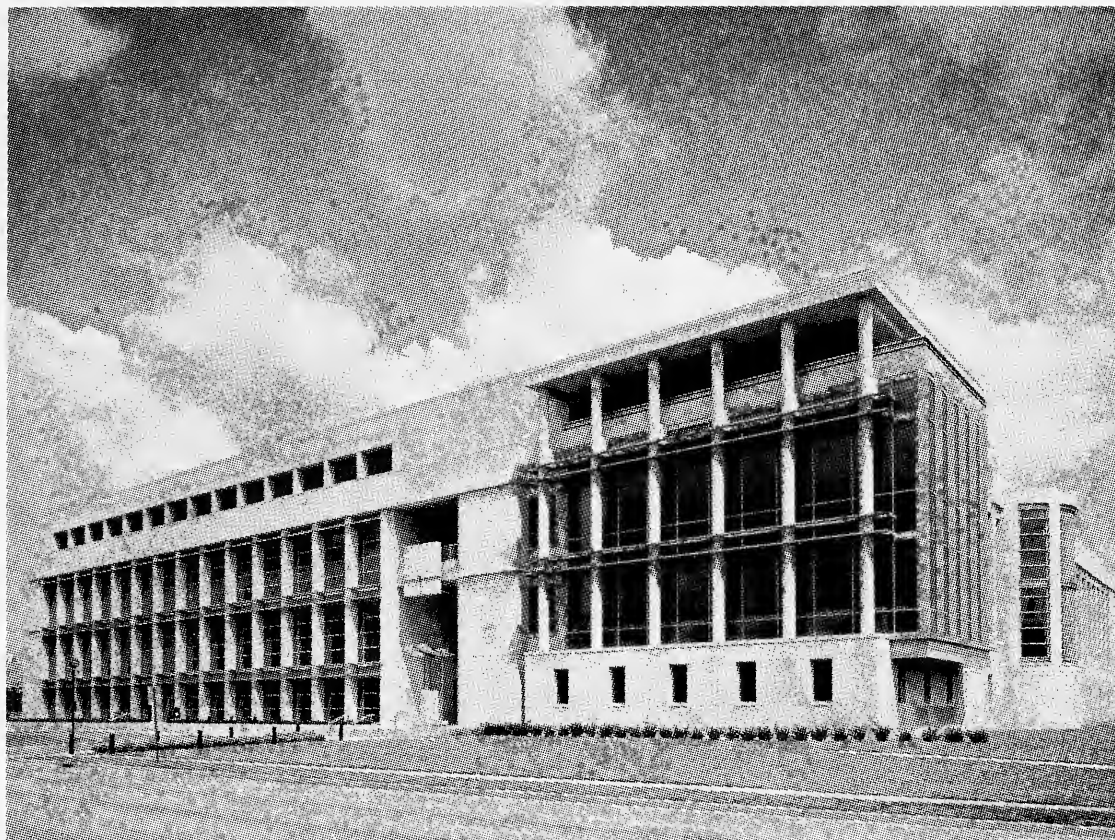
Does religion have a place in state governments and in public schools? If so, how does law define that role? In creating a place for students to learn about religion in the public school setting, where does the authority of the state end and that of the local school district begin? Who should ultimately be deciding how religion is addressed in public school classrooms? The state citizens, the local taxpayers, the school district board, the teachers, the parents? The Program on Law and State Government and the *Indiana Law Review* welcome your participation in the 2006 Program on Law and State Government Fellowship Symposium.

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*Integrity in Public Service: Living Up to the Public Trust?*

### INTRODUCTION: THE ROLE OF LAW, LAWMAKERS, AND CITIZENS IN ESTABLISHING PUBLIC TRUST

CYNTHIA A. BAKER\*

Designed to challenge us to a better understanding of the relationship between law and public integrity, the 2005 Program on Law and State Government Fellowship Symposium brought together a stellar faculty from around the state and nation to discuss how laws, lawmakers, and citizens shape the ethical standards and behavior of public officials and employees. The fifth fellowship event since the Program on Law and State Government's inception in 1997, *Integrity in Public Service: Living Up to the Public Trust?*, embodied the Program's mission of fostering the study and research of critical legal issues facing state governments.<sup>1</sup> A vital component of the Program on Law and State Government, the Fellowships offer an extracurricular academic opportunity for students interested in contributing to the contemporary scholarship of law and state government.<sup>2</sup> Like the symposium, the articles and remarks collected in this review result from the ideas, research, and work of the 2005 Program on Law and State Government Fellows, Michael Montagano<sup>3</sup> and Shariq Siddiqui.<sup>4</sup>

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1. The Program on Law and State Government Fellowship Symposium, *Integrity in Public Service: Living Up to the Public Trust?*, was held on September 29, 2005, in the Wynne Courtroom of Indiana University School of Law—Indianapolis.

2. Awarded on a competitive basis, the Program on Law and State Government Fellowships allow two students the opportunity to work together for one year exploring a topic of their choice concerning a critical legal issue facing state governments in exchange for a tuition credit of up to \$5000. Working under the guidance of the Director of the Program on Law and State Government, Fellowship responsibilities include hosting an academic event and collaborating to write an academic paper on the Fellowship topic.

3. Program on Law and State Government Fellow, 2005. J.D. Candidate, 2006, Indiana University School of Law—Indianapolis; B.A., 2003, DePauw University.

4. Program on Law and State Government Fellow, 2005. Ph.D. Candidate, 2007, Indiana University; J.D., 2005, Indiana University School of Law—Indianapolis; M.A., 2004, Indiana University; B.A., *with distinction*, 1996, University of Indianapolis.

The study of the value judgments that imbue the term “integrity” with individual and communal meaning is neither discrete nor easily understood. Integrity remains something that all of us would like to have, not only in our public officials and leaders, but in every one of our concentric circles of communities, public and private.<sup>5</sup> Some statistics and scholarly research shared at the symposium indicate that public mistrust has replaced the public trust. What do these statistics mean, and what is the role of law in response?

Is a perception of a degradation of public trust a function of an increase in poor behavior (self dealing, using public office for private gain, dishonesty) on the part of our public servants? Or is it a function of the larger fabric of mistrust of institutions, public and private, that has filled the news pages, radio waves, and web-pages in the last ten years? Is it, perhaps, a function of the tremendous amount of information and the speed with which we learn information about leaders that fail to “live up the public trust”? Or is the degradation of public trust, real or perceived, a counterintuitive result of the explosion of ethics laws passed by state and local governments in the past twenty years? Regardless of the difficulty of measuring the public’s trust in government, we, as lawyers and as citizens of a democracy, have a vested interest in understanding the value of that trust and understanding how our laws and our governments affect that trust.

The 2005 Fellowship Symposium began with Program on Law and State Government Fellow Michael Montagano’s remarks regarding state legislative ethics. Noting that, “high moral and ethical standards among State Senators are essential to the conduct of free government,”<sup>6</sup> Mr. Montagano explored the body of laws, rules, and cultural norms that shapes how elected officials address ethical dilemmas inherent in a representative democracy, paying specific attention to how those dilemmas may be exacerbated in a state, like Indiana, with a part-time citizen legislature.

Ms. Roberta Baskin, the recipient of over seventy journalism awards during her accomplished career as an investigative journalist and currently serving as the Executive Director of The Center for Public Integrity, delivered the morning address. She examined the role of citizens and the media in picking up where law sometimes cannot reach, that is, into that thick set of social norms that distinguishes right from wrong within discrete cultures. Ms. Baskin discussed The Center for Public Integrity’s State Projects’ conclusion that disclosure does not lead to accountability without accessibility and context. Undoubtedly, the initiative continues to raise citizen awareness concerning the wealth and power of those we elect to make our laws at the state government level. In her singularly influential role of watching the watchdogs, Ms. Baskin addressed the challenges facing the media and citizens in interpreting the increasingly polarized public discourse on what type of public integrity we expect from our elected leaders. Ms. Baskin’s contributions to this discourse reminded symposium attendees that, as citizens within a representative democracy, Americans cannot

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5. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

6. IND. SENATE, STANDING RULES AND ORDERS 87 (2005), available at <http://www.in.gov/legislative/session/senate1.pdf>.

accept “not doing anything illegal” or “but, I meant well” as rationales for unethical behavior.

The morning panel discussion entitled, *Models and Directions for Legislative Ethics in Indiana*, featured Edward D. Feigenbaum,<sup>7</sup> Peggy Kerns,<sup>8</sup> and Indiana State Senator J. Murray Clark.<sup>9</sup> The panel addressed the importance of matching citizen expectations of public integrity with a combination of rules of conduct, ethics education, and disclosure laws. Steve Schultz, General Counsel to the Governor of Indiana, delivered the luncheon address and compared the governmental and corporate responses to doing business in the age of transparency. Mr. Schultz noted that in the corporate and government worlds, earning the public trust depends on transparency. In discussing the challenges concomitant to today’s rising expectations and unprecedented access to public information, Mr. Schultz described several executive orders, laws, and policies passed in 2005 to make Indiana a national model for state government ethics.

The afternoon session began with Program on Law and State Government Fellow Shariq Siddiqui’s presentation of his paper, *State Government Design and Incentives for Local Codes of Ethics*. Addressing ethics laws applicable to paid and unpaid government employees and appointed, rather than elected, officials, Mr. Siddiqui’s presentation reminded symposium attendees that our struggle for integrity in public service is not a new one. Specifically, Mr. Siddiqui retold a story from Plutarch’s history about Pericles’ sculpture of Pallas Athena. Pericles, the ruler of Athens, commissioned Phideas to sculpt the work for the Parthenon, a public building. According to Plutarch’s history, the sculptor’s adornment of the goddess’s shield with images of himself and his patron resulted in the artist being tried, convicted, and imprisoned for abusing the public trust. In contrast to the retribution dealt to sculptor Phideas so long ago, Mr. Siddiqui suggested that attainment of public trust in today’s world requires understandable codes of ethics, meaningful, accessible disclosure of information concerning conflicts of interest, and consistent enforcement of breaches of unethical conduct.

The afternoon address by Dean Patricia Salkin<sup>10</sup> presented contradictions in prevailing case law regarding government lawyer-client confidentiality. Dean Salkin’s address, *Confidential Conversations Between Government Lawyers and Their Clients: Fact or Fiction?*, brought symposium attendees up to date on recent legal developments concerning judicial recognition of the attorney-client privilege. Then, she shared her scholarship about how government attorneys can manage their work, and their client’s confidences, in this nuanced milieu of changing interpretations of professional responsibility for the government attorney.

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7. Executive Director, INGroup.

8. Director, Center for Ethics in Government at the National Conference of State Legislatures and former Representative, Colorado General Assembly.

9. Senator to the Indiana General Assembly (1994-2006) and former Chairperson, Indiana Senate Ethics Committee (2000-04).

10. Associate Dean, Professor of Law, and Director, Government Law Center, Albany Law School.

The symposium's second panel discussion, *Government Models of Integrity: Codes of Ethics Explored*, featured Professor Edward Charbonneau,<sup>11</sup> Carla Miller,<sup>12</sup> David Maidenbergl,<sup>13</sup> and Dean Patricia Salkin. The panelists shared their experiences of various approaches to achieving expectations, codes, and standards of public integrity from Central Indiana; Jacksonville, Florida; Albany, New York; and Northwest Indiana. In doing so, the panel addressed the strengths and weaknesses of each component of achieving public integrity: setting aspirational goals, establishing definitions for ethics and public integrity, creating workable ethics law at the state and local levels, education, and providing meaningful enforcement.

The 2005 Fellowship symposium confronted a vast array of ideas, legal approaches, philosophies, laws, and government models that were integral to many of my conversations with Program on Law and State Government Fellows since December 2004. As the custodian of the Program on Law and State Government Fellowship experience at Indiana University—Indianapolis, it is my sincere hope that the articles and remarks presented in this volume invite readers to contemplate the question around which this symposium was created: What are the roles of lawyers, lawmakers, and citizens in establishing the public trust? The Program on Law and State Government thanks the Indiana Law Review for continuing the dialogue between state governments and the academic community by including the symposium pieces in this issue. The Program on Law and State Government also thanks all of those who made scholarly contributions to the 2005 Symposium, especially those whose articles are published here. Finally, the Program on Law and State Government celebrates the work of the 2005 Fellows, Michael Montagano and Shariq Siddiqui.

Cynthia A. Baker

Director, Program on Law and State Government

October 2005

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11. Professor of Political Science, Indiana University Northwest.

12. Representative, Council on Governmental Ethics Law and Ethics Officer, City of Jacksonville, Florida.

13. Former Director, Indiana State Ethics Commission.

## REMARKS

### THE STATE OF STATE LEGISLATIVE ETHICS: WATCHING THE WATCHDOGS\*

ROBERTA BASKIN\*\*

The Center for Public Integrity is a nonprofit, non-partisan research organization that studies public policy issues and their effect on the United States and the international community.<sup>1</sup> The Center's analysis spans the local, national, and international sphere with one central goal: to serve as an honest broker of information that inspires citizens to hold government accountable at all levels.

Since its founding in 1989, the nonprofit, non-partisan center has released more than 275 investigative reports and has been repeatedly honored by its peer organizations for its public service journalism. We do not take funding from governments, corporations, unions, or anonymous donors, but we rely instead on foundation grants and support from our citizen members.

The Center has been called a “watchdog in the corridors of power.” It has been called a “model for a new generation” of news. It has also been called the “Left of Center for Public Integrity.” But let me share this little-known fact: The Center broke the “Lincoln Bedroom” story in 1996. You know, the one in which President Clinton sort of auctioned off stays in the White House to the bidder with the most campaign cash for him. The Center's newsletter published a profile of seventy-five high-profile big-time Democratic fund-raisers and donors who had also spent overnights in the posh surroundings of the Clinton White House. About six months later, the administration finally honored the Center's request for the names of all overnight White House guests—the first time any sitting president had released that information to the press. The rest was history, and the original Center newsletter report that first introduced the issue to public discussion later won the Society of Professional Journalists' “Public Service” award.

Outside the U.S. borders and politics, since 1997 the Center has been looking at corruption and ethics across borders through its International Consortium of Investigative Journalists. This cross-border group of nearly 100 journalists made one of its first big splashes with a report on international Big Tobacco and the massive profits and influence in place behind the scenes at cigarette companies familiar to the average citizen—and more than familiar to the average legislator in the United States—that worked hand-in-hand with organized crime to operate a massive international smuggling network.

The Center for Public Integrity's State Projects started with a very simple idea: disclosure does not lead to accountability without accessibility and context.

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\* This is a revised version of the remarks delivered at the Indiana University School of Law—Indianapolis, Program on Law and State Government, *Integrity in Public Service: Living Up to the Public Trust?*, 2005 Fellowship Symposium, on September 29, 2005.

\*\* Executive Director, Center for Public Integrity. An investigative journalist since the 1970s, Baskin has won seventy-five journalism awards, including two duPont-Columbia University Awards and two George Foster Peabody Awards for her investigative reporting.

1. Center for Public Integrity, <http://www.publicintegrity.org> (last visited May 17, 2006).

In 1995, we gathered the paper campaign finance reports that Indiana legislative candidates filed with the Elections Division of the Indiana Secretary of State, typed them into a database, and analyzed the patterns. We partnered with local media to develop our findings into investigative reports that showed how special interests dominated the legislature. One of our collaborators, the *Indianapolis Star and News*, straightforwardly reported what we found: “[a]n unprecedented coalition of about 40 big-business interests persuaded a sympathetic Republican majority to pass a ‘wish list’ of favorable laws in 1995.”<sup>2</sup> While our work in Indiana, and later Illinois, touched off a nationwide movement to computerize state campaign finance records and make them available on the Internet, we chose to follow a different trail unearthed by our investigation.

During our Illinois research, we came across anecdotal evidence that special interests used more direct methods to influence state lawmakers than writing campaign checks. They could put that money directly in a lawmaker’s bank account. We discovered that high-ranking legislators in Illinois—from both parties—were on the payroll of the special interests they were supposed to oversee. And that, we thought, might not be an anomaly.

There are some 7400 elected state lawmakers, the majority of whom spend a fraction of their time working for the people. These men and women pass laws influencing everything from the education of children to the hospice care of the elderly; they set environmental policy and determine the manner in which citizens vote in federal elections. All of them have private financial interests, and few have any restrictions over whom they can work for or how much money they can earn while holding office.

Starting in 2001, we began posting on our website every financial disclosure form filed by lawmakers in the forty-seven states that require them. We found that more than one quarter of state legislators sat on a committee that regulated at least one of their professional or business interests. From those potential conflicts of interest, we have isolated actual conflicts and steered reporters to countless others.

That year we also began examining the effectiveness of state ethics laws and institutions. We found that twenty-seven states allow lawmakers to oversee their own ethics, and among those states with an independent agency overseeing ethics among legislators, twelve of the commissions had not ruled against a lawmaker in the last five years. In 2002, we began analyzing what has grown to a \$1 billion a year industry: Lobbying statehouses. We have also found a way to quantify state disclosure laws, ranking the thoroughness and quality of information that lobbyists and lawmakers alike must make available to public scrutiny.

These state ethics laws often seem like a façade—hanging there with nothing holding them up. The Center for Public Integrity strives to put these laws to work—to squeeze out the substance of the laws. That is why we spend hours obtaining, computerizing, and analyzing thousands of documents every year. With the use of databases and the web, the Center puts the “public” back into “public records.”

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2. Janet E. Williams et al., *Statehouse Sellout: How Special Interests Hijacked the Legislature*, INDIANAPOLIS STAR, Feb. 11, 1996, at A1.

However, these records can only take us so far. People on all sides become the unknown in the equation—legislators, lobbyists, journalists, the general public. A government for the people needs to provide all these players with the tools to do the best they can; those tools are a combination of disclosure laws, conduct rules, and ethics education. After that, we must rely on the personal integrity of all involved.

From the Center's ongoing studies of state ethics across the country, it is clear that there is no universally accepted definition of ethics in regard to lawmakers. Instead there are some general guidelines, such as no use of office for personal gain, common from state to state, and then various ways states have set up to monitor and enforce those guidelines.

Ethics laws generally come in two categories: disclosure and conduct.

Disclosure laws require campaign finance statements, the lobbyists' statements and legislators' personal financial disclosures. These disclosure forms serve two purposes—one as a preventative measure for those filing the forms (if they have to report it every year, it is a reminder of the laws they should be operating under and they may be more likely to think twice if an ethical dilemma presents itself); and one as an educational tool for the public (people can really learn about the inner-workings of their governments by diving into these public records). These filings are collected and regulated by various agencies, including independent state ethics agencies, departments of the secretaries of state, or the chambers themselves. The Center for Public Integrity's State Projects have done extensive work on campaign finance reports regarding political parties,<sup>3</sup> state lobbying disclosure,<sup>4</sup> and legislative outside interest reporting.<sup>5</sup>

Conduct laws govern the actions of lawmakers, other public officials, and state employees while they are in their public positions. These laws vary extensively from state to state but can encompass categories such as conflict of interest, abuse of power, nepotism, post-term employment (how long until legislators can become lobbyists after serving), and acceptance of gifts, travel payments, and speaking fees, among other topics. In regard to oversight of legislators' conduct, states have set up two systems: twenty-three states have set up independent bodies to oversee conduct of legislators, while the remaining twenty-seven states have legislators policing their own conduct. This is a touchy discussion. Many critics of independent agencies say they violate separation of power provisions set up in constitutions (i.e., since the three branches of government are set up separately, they should be left to regulate themselves). However, in quite a few instances the public has voted in the independent oversight of their legislature through referendums. The Center's State Projects studied these wide-ranging ethics laws in the states in 2001.<sup>6</sup>

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3. Center for Public Integrity, *Party Lines*, <http://www.publicintegrity.org/partylines/> (last visited May 17, 2006).

4. Center for Public Integrity, *Hired Guns*, <http://www.publicintegrity.org/hiredguns/> (last visited May 17, 2006).

5. Center for Public Integrity, *Our Private Legislatures*, <http://www.publicintegrity.org/oi/> (last visited May 17, 2006).

6. Center for Public Integrity, *Watchdogs on Short Leashes*, <http://www.publicintegrity.org/>

Although ethics laws differ across the country, the universal philosophical driver for these policies is to boost public trust in government. Many state statutes lead with something to that effect.

Many states enacted their first ethics laws in the wake of the Watergate scandal. The criminal conspiracy that began with a botched break-in and ended with the resignation of President Richard M. Nixon sent shock waves through federal, state, and local governments. Before the scandal, most governmental bodies had no specific laws prohibiting elected officials from using their offices for personal gain, let alone bodies to interpret and punish government corruption. Voters assumed that officials, from the president on down to volunteer mayors in small towns, would adhere to general principles of honest service or, in some cases, vague and ill-defined references to honorable public service in documents like the federal or state constitutions or town charters.

Watergate sent American lawmaking bodies scrambling to codify what, precisely, was meant by honest public service and, in some cases, to create agencies to interpret and enforce these new “ethics laws.” The U.S. Congress and state legislatures across the country drafted complex laws requiring government employees and officials to disclose their sources of personal income and campaign funding, adhere to rules for official conduct, and answer to new bodies created to oversee those rules. Only one state—Hawaii, in 1968—had established an ethics commission prior to the scandal. By 1979, twenty-two other states established outside oversight. The new ethics agencies were intended to reassure the public that something other than honor ensured the integrity of public officials.

Currently, twenty-three states have outside oversight of ethical conduct of members of the legislature. Adding the nine states that have outside oversight of legislative disclosure laws, there are thirty-two states in which independent commissions have some oversight of the conduct and disclosure filings of the legislature. However, the Center learned those agencies maintained adversarial relationships with the lawmakers they regulated and were often ill-equipped to enforce the regulations due to inadequate funding or staffing, or weak enforcement or investigation mechanisms.

For a project called “Power and Money in Indiana” in 1996, the Center for Public Integrity’s first examination of state legislatures, Center researchers developed a database of Indiana state legislative campaign contribution records, coded by interest groups. This previously inaccessible data was given to a dozen news organizations and eight political science professors in the state, and the result was massive, investigative news coverage throughout the Hoosier state. The *Indianapolis Star*;<sup>7</sup> WTHR-TV Channel 13, the NBC affiliate in Indianapolis; the Fort Wayne *Journal-Gazette*; and the *Evansville Courier* all developed stories and series examining the state legislature.

It was the first time Indiana citizens had ever read such breadth and detail about their politicians and the forces behind them. Within days, 2500 people contacted the *Star*, angry about what they had read—the largest response to any

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ethics/ (last visited May 17, 2006).

7. Williams et al., *supra* note 2.

story in the newspaper's history. Weeks later, the legislature took up a formerly tabled bill and voted to computerize campaign records and make them available online to the public (although it took lawmakers a full year to actually authorize the necessary money). A commission was created to study ways to improve the state's campaign finance system.

The arrogance and indignation by the state legislators were palpable. For example, when a *Star* reporter showed Indiana Senate President Pro Tempore Robert Garton the stacks of angry reader mail, he harrumphed and said, "What gives them the right to question us? What gives them the right to question our integrity?"<sup>8</sup> The reporter observed that citizens elect lawmakers and believe that they are supposed to work for the public. Garton acknowledged that point.

The *Star* remained vigilant, continuing the "Statehouse Sellout" series, but the legislature did not. The Campaign Disclosure Project found in 2004 that Indiana has good access to its campaign finance information and website, but still gets an overall "C-" because of a low grade in electronic filing and a weak campaign disclosure law that ranks among the ten worst in the country.<sup>9</sup> This is due to infrequent filing, contributors not being required to report employer information, and a lack of reporting on independent expenditures, or campaign spending by outside groups on behalf of candidates. Strikingly, Indiana is the only state in the nation that does not require reporting of in-kind contributions—those donations that come in the form of goods or time instead of cash.

After the interesting experience with citizen reaction in Indiana, the Center wanted to be able to put state laws into a nationwide context, so we expanded our scope to evaluate disclosure laws. Disclosure laws speak to the heart of transparent democracy—and can be useful to both the general public and journalists.

In "Our Private Legislatures" we looked at the fact that although state legislators frequently have jurisdiction over areas in which they hold personal interests, many states have weak mechanisms for disclosing those ties. In fact, twenty-four states received failing scores from the Center for Public Integrity on making basic information about the outside interests of their legislators available to the public.

As of 2004, Indiana ranks twenty-eighth in the country, with a failing score of 59.5 out of 100 points.<sup>10</sup> In evaluating the financial-disclosure laws that apply to members of the legislatures in all fifty states, the Center used criteria drawn from the following categories: outside employment, investments, ownership of real property, officer/directorships, clients, family income and interests, public access to disclosure records, and the existence of penalties for violations of the disclosure laws. Indiana has some narrow definitions of what is required to be

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8. Charles Lewis, *Revealing State Secrets*, COLUM. JOURNALISM REV., May/June 1998, available at <http://archives.cjr.org/year/98/3/state.asp>.

9. Campaign Disclosure Project, *Grading State Disclosure 2004 Indiana*, <http://www.campaigndisclosure.org/gradingstate2004.in.html>.

10. Center for Public Integrity, *Indiana Disclosure Ranking Report Card*, OUR PRIVATE LEGISLATURES, Apr. 19, 2006, <http://www.publicintegrity.org/oi/iys.aspx?st=IN&sub=report>.

disclosed and does not require any reporting of real property owned by legislators. Also, there are no late- or mis-filing penalties on the books.

Another Center report turned toward lobbying on the state level, where lobbyists and their employers in forty-two states spent more than \$964 million wining, dining, and generally influencing state lawmakers in 2004. Many details about how those dollars were spent remain hidden from public view. One way for the public to trace the fingerprints left on the 29,000 bills states enacted in 2002 is by looking at the disclosure reports lobbyists or their employers are required to file.

As of 2003, Indiana ranks twelfth in the nation, with a “D” score of 66 out of 100 points.<sup>11</sup> These reports should show where lobby money came from, where it went, and why it was spent. They are, in short, a critical measure of external influences on both legislation and legislators. But trying to follow that trail with many states’ current disclosure mechanisms is a daunting, and sometimes fruitless, challenge.

The Center’s founder and former executive director, Charles Lewis, remarked following one project examining conflicts of interest and self-dealing in state legislatures across the country that “these guys make the U.S. Congress look like kindergarten.”<sup>12</sup> At the very core, legislative ethics are up to the individual. If a legislator is determined to commit a behavior that violates ethical standards set before them, there is no amount of regulation that will prevent dishonestly.

With so much potential for conflict and so many legislators overseeing their own ethics, the need for the checks and balances provided by the media and the public are critical—and yet, news coverage at the state capitol level is on the decline across the country. A statistic from the *American Journalism Review* offers a perfect example of this: in a year during which only 626 reporters report full-time on state government, more than 3000 media passes were issued for the Super Bowl.<sup>13</sup> More and more, citizens themselves are doing the work journalists neglect—searching for and spreading information to hold those in power accountable. This is part of the reason the Center has dedicated so much energy to taking disclosure information and making it accessible and straightforward for citizens.

As we concluded almost a decade ago when beginning the States Projects investigation into legislatures around the country, the most comprehensive ethics laws in the country will not create an accountable, honest government if the information does not reach the people.

Transparency in ethics laws is essential if they are to have any effect and ensure that legislators and the groups and citizens that monitor them can both serve the public’s best interest.

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11. Center for Public Integrity, *State Pages*, HIRED GUNS, May 15, 2003, <http://www.publicintegrity.org/hiredguns/nationwide.aspx?st=IN&display=PrStateNumbers>.

12. Center for Public Integrity, *Frequently Asked Questions*, OUR PRIVATE LEGISLATURES, <http://www.publicintegrity.org/oi/default.aspx?act=faq> (last visited May 17, 2006).

13. Charles Layton & Mary Walton, *State of the American Newspaper: Missing the Story at the Statehouse*, AM. JOURNALISM REV., July/Aug. 1998, available at <http://www.ajr.org/Article.asp?id=3279>.

TEN VITAL VIRTUES FOR AMERICAN PUBLIC LAWYERS

ROBERT F. BLOMQUIST\*

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In the tradition of the “great books” of the last five millennia of human civilization,<sup>1</sup> virtue and vice have been persistent and vital themes.<sup>2</sup>

\* Professor of Law, Valparaiso University School of Law. B.S., 1973, University of Pennsylvania (Wharton School); J.D., 1977, Cornell University. My thanks go to my law students over the last twenty years who have inspired the meditations contained in this Article.

1. Robert Maynard Hutchins, former president of the University of Chicago, once described the continued engagement by each new generation with the great books of the past as a “Great Conversation.” Specifically, Hutchins wrote:

Until lately the West has regarded it as self-evident that the road to education lay through great books. No [person] was educated unless he was acquainted with the masterpieces of his tradition. There never was very much doubt in anybody’s mind about which the masterpieces were. They were the books that had endured and that the common voice of mankind called the finest creations, in writing, of the Western mind.

In the course of history, from epoch to epoch, new books have been written that have

[T]he scope of these terms and the range of the problems in which they are involved seem to be co-extensive with morality; or, in other words, with the broadest consideration of good and evil in human life, with what is right and wrong for [human beings] not only to do, but also to wish or desire, and even to think.<sup>3</sup>

However, “[f]or some of the great moral philosophers, other terms—such as duty for Marcus Aurelius and Kant, or pleasure and utility for Mill—seem to be more central.”<sup>4</sup> Yet, “for Plato, Aristotle, and Aquinas virtue is a basic moral principle. By reference to it they define the good [person], the good life, and the good society.”<sup>5</sup> But “even for them it is not the first principle of ethics. They define virtue itself by reference to a more ultimate good—happiness. For them the virtues are ordered to happiness as means to an end.”<sup>6</sup>

Authors of the great books—such as Plato, Aristotle, Aquinas, Dante, Hobbes and Spinoza—have discussed and debated the classification of virtues

won their place on the list. Books once thought entitled to belong to it have been superseded; and this process of change will continue as long as [people] can think and write. It is the task of every generation to reassess the tradition in which it lives, to discard what it cannot use, and to bring into context with the distant and intermediate past the most recent contributions to the Great Conversation.

Robert M. Hutchins, *The Great Conversation: The Substance of a Liberal Education*, in 1 GREAT BOOKS OF THE WESTERN WORLD, at xi (Robert Maynard Hutchins ed., 1952). In a similar vein, Professor J. Rufus Fears defined a great book as follows:

- A. A great book has a great theme. It discusses ideas of enduring importance.
- B. A great book is written in language that elevates the soul and enables the mind.
- C. A great book must speak across the ages, reaching the hearts and minds of people far removed in time and space from the era and circumstances in which it was composed. Thus, a great book summarizes the enduring values and ideas of a great age and gives them as a legacy to future generations.
- D. Great books are an education for freedom.

J. RUFUS FEARS, 1 BOOKS THAT HAVE MADE HISTORY: BOOKS THAT CAN CHANGE YOUR LIFE 3 (2005) (course transcript) (available for purchase at <http://www.teach12.com>).

2. According to the practical philosopher, Mortimer J. Adler, “virtue and vice”—two philosophical themes—are categorized as one of the 102 “great ideas” that have been discussed in the “great books” over the millennia. A sampling of some of these other great ideas, in alphabetical order, are as follows: Angel, Aristocracy, Art, Cause, Change, Courage, Dialectic, Experience, Family, Fate, God, Government, Language, Law, Mathematics, Matter, Mind, Nature, Progress, Reasoning, Space, Truth, and Wisdom. Mortimer J. Adler, *Table of Contents*, in 2 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 1, at ix-x; 3 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 1, at vii.

3. 3 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 1, at 3.

4. *Id.*

5. *Id.*

6. *Id.*

and the correlative vices over the centuries.<sup>7</sup> Thus, in the tradition of the great books, thinkers through the ages have attempted to divide the virtues according to the parts or powers of the soul. They have made distinctions between moral virtue and intellectual virtue and even propounded theories of the so-called cardinal virtues.<sup>8</sup> Moreover, a variety of other issues about virtue has taken up barrels of ink and forests of trees in the great books. Some of these miscellaneous virtue topics include: the order and connection of the virtues; the causes and conditions of virtue (including the process of habit formation); the psychological factors in the creation of moral virtue (including the roles of pleasure and pain and desire); virtue as compared to other moral goods or principles (such as duty and virtue, honor and virtue, and wealth and virtue); the role of virtue in political theory (such as civic virtue and the qualities which constitute a good or successful ruler); the religious dimensions of virtue and vice (including the moral consequences of original sin, divine reward for virtue and punishment for vice, the nature of theological virtues); and the relative advance or decline of human morality.<sup>9</sup>

In recent years, modern philosophers have tried to reconceptualize virtue ethics by focusing on the formation of virtues in specific beings and concrete human situations.<sup>10</sup> Notable works by philosophers in the modern virtue ethics tradition include books by Philippa Foot, Alasdair MacIntyre, Martha Nussbaum, Gabriele Taylor and Bernard Williams.<sup>11</sup> Moreover, during the 1980s and 1990s,

7. See *id.* at 988-89 for bibliography.

8. See *id.* at 983.

9. See *id.* at 983-84.

10. See *infra* notes 11-18 and accompanying text.

11. See PHILIPPA FOOT, *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* (1978); ALASDAIR C. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* (1986); GABRIELLE TAYLOR, *PRIDE, SHAME, AND GUILT: EMOTIONS OF SELF-ASSESSMENT* (1985); BERNARD WILLIAMS, *MORAL LUCK: PHILOSOPHICAL PAPERS, 1973-1980* (1981). University of Michigan philosophy professor, Peter Railton, traced the neglect of virtue ethics during most of the twentieth century and a renaissance of renewed interest in recent years in a book chapter. See Peter Railton, *Toward an Ethics That Inhabits the World*, in *THE FUTURE FOR PHILOSOPHY* 265 (Brian Leiter ed., 2004). According to Railton:

Dissatisfaction with the limited conception of moral action available to duty-based approaches to moral practice, and with the relative impoverishment of prevalent philosophical treatments of the role of emotion and motivation in moral thought, helped stimulate a revival of interest in virtue theories toward the end of twentieth century. Virtue theory had been influential in moral philosophy from ancient times into the early modern period, but it nonetheless suffered neglect in the twentieth century, partly because of incompletely-formulated doubts about whether such theories could really “add” anything to a proper account of moral obligation. It was felt that moral virtue either was a matter of *possessing* “non-cognitive” motivations or feelings not under conscientious voluntary control—“being brave”, say—, and therefore outside the scope of a properly moral “ought”, or it was a matter of striving *conscientiously toward*

a few legal scholars interested in legal ethics wrote about the personhood of lawyers and specific risks to lawyers' character and moral development by the decisions they make (or failed to make),<sup>12</sup> by the ideals they cultivated (or failed to cultivate),<sup>13</sup> and by the moral responsibility they exercised (or neglected to exercise).<sup>14</sup> A symposium published in 2002 by *Notre Dame Law Review* in honor of the scholarship of Professor Thomas Shaffer did an excellent job of explaining virtue ethics theory and the law and delving deeply into essential moral qualities needed by modern American lawyers.<sup>15</sup>

Personally, I have been enthralled with various facets of law and virtue ethics. For example, within the last few years, I published articles that seek to explore what it might be like to describe a virtuous legislator.<sup>16</sup> Also, turning to the intertwined ethical and legal roles imposed by the Constitution on the President of the United States by the Presidential Oath Clause, I sketched out a theory of "presprudence" "to describe the systematic analysis of all public legal actions, legal statements and interpretations of law that the President of the United States engages in within the framework of jurisprudential philosophies about the role and nature of law."<sup>17</sup> The culmination of my thinking on the topic

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developing such valuable motivations or feelings or acting in accord with them—"trying to be brave" or "trying to act bravely", say—, in which case a theory of obligation could already incorporate it.

*Id.* at 271.

12. See, e.g., RAND JACK & DANA CROWLEY JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* (1989).

13. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

14. See, e.g., THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994).

15. Two articles in this symposium are elucidating: Marie A. Failing, *Is Tom Shaffer a Covenantal Lawyer?*, 77 NOTRE DAME L. REV. 705 (2002), and Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 NOTRE DAME L. REV. 841 (2002).

16. Robert F. Blomquist, *The Good American Legislator: Some Legal Process Perspectives and Possibilities*, 38 AKRON L. REV. 895 (2005). For a more particularized foray in pursuit of describing a virtuous environmental law legislator, see Robert F. Blomquist, *In Search of Themis: Toward the Meaning of the Ideal Legislator—Senator Edmund S. Muskie and the Early Development of Modern American Environmental Law, 1965-1968*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 539 (2004); Robert F. Blomquist, *Senator Edmund S. Muskie and the Dawn of Modern American Environmental Law: First Term, 1959-1964*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 509 (2002); Robert F. Blomquist, *Nature's Statesman: The Enduring Environmental Law Legacy of Edmund S. Muskie of Maine*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 233 (2000); Robert F. Blomquist, *"To Stir Up Public Interest": Edmund S. Muskie and the U.S. Senate Special Subcommittee's Water Pollution Investigations and Legislative Activities 1963-66: A Case Study in Early Congressional Environmental Policy Development*, 22 COLUM. J. ENVTL. L. 1 (1997).

17. Robert F. Blomquist, *The Presidential Oath, The American National Interest and a Call for Presprudence*, 73 UMKC L. REV. 1, 50 (2004). I had the honor of having this article cited by

of law and virtue ethics is a book manuscript entitled *Lawyerly Virtues*.<sup>18</sup>

In this Article, I will turn my attention to the special ethical context of public lawyers. Part I of the Article defines what it means to be a public lawyer in the United States. Part II provides a synopsis of my take on the ten most important lawyerly virtues. This discussion ranks the top ten lawyerly virtues and explains why they are important for all types of lawyers (and for law students) to cultivate and to master. Finally, Part III provides some brief meditations on a few of the unique challenges faced by American public lawyers in grasping and applying the ten lawyerly virtues to their professional lives.

I. WHAT IS AN AMERICAN PUBLIC LAWYER?

A. *Definitional and Historical Background*

We start our analysis of the meaning of a “public lawyer” by considering the definition of “public.” According to the *Oxford English Dictionary* (“OED”), the broadest definition of “public” is “the opposite of private” and “[o]f or pertaining to the people as a whole; that belongs to, affects, or concerns the community or nation; common, national, popular.”<sup>19</sup> That venerable source of etymological scholarship candidly observes that “[t]he varieties of sense are numerous and pass into each other by many intermediate shades of meaning.”<sup>20</sup> Thus, some of the various uses of “public” include: *public act or bill*,<sup>21</sup> *public office*,<sup>22</sup> *public opinion*,<sup>23</sup> *public service*,<sup>24</sup> *public menace or nuisance*,<sup>25</sup> *public interest*,<sup>26</sup> *public utility*,<sup>27</sup> and *public sector*.<sup>28</sup> Moreover, various hyphenated words have evolved in English usage, focusing on facets of publicness: *public-heartedness*, *public-mindedness*, *public-voiced*, and *public-spirited* are some prominent examples.<sup>29</sup>

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U.S. Supreme Court Justice Antonin Scalia. See *McCreary County Ky. v. Am. Civil Liberties Union of Ky.*, 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting).

18. ROBERT F. BLOMQUIST, *LAWYERLY VIRTUES* (Oct. 1, 2005) (unpublished book, on file with author).

19. XII THE OXFORD ENGLISH DICTIONARY 778 (2d. ed. 1989).

20. *Id.*

21. “[A] parliamentary act or bill which affects the community at large[.]” *Id.* at 779.

22. “[A] building or set of buildings used for various departments of civic business . . .” *Id.*

23. “[T]he opinion of the mass of the community . . .” *Id.*

24. “[S]ervice to the community, [especially] under the direction of the government or other official agency; consideration of the common good . . .” *Id.*

25. “[A]nyone or anything obnoxious or annoying to the community.” *Id.*

26. “[T]he common well-being . . . Also, public welfare.” *Id.*

27. “[A] service or supply, such as electricity, water, or transport, considered necessary to the community, [usually] controlled by a (nationalized or private) monopoly and subject to public regulation.” *Id.*

28. “[T]hat part of an economy industry, etc., which is controlled by the state at any level of government.” *Id.*

29. *Id.* at 781. One of the more quaint uses of “public” relates to English university tradition:

The aforementioned etymology provides a useful context for the OED definition of *public law*: “that part of the law pertaining to the state and its relationship with the person subject to it.”<sup>30</sup>

Every first year law student hears his or her professors making a distinction between “private law” (exemplified by subjects like contracts, torts and property), “encompass[ing] law that principally emerges from disputes between private individuals,”<sup>31</sup> and public law controversies, involving the common well-being of a society. In private law disputes, “[t]he focus, typically, is on resolving a particular controversy within a set of rules evolved”<sup>32</sup> for the purpose of advancing such private interests as autonomy, low transaction costs and reasonableness. “The basis for these [private law] rules often is the common law, although there are now many statutes that supply the governing law—for example the Uniform Commercial Code applies to many contract cases.”<sup>33</sup> Alternatively, “[s]ome of the great public law areas, which invariably involve governmental bodies, are subjects like administrative law and other regulatory law”<sup>34</sup>—such as environmental law, telecommunications law, and food and drug law.

The public law subjects usually find their roots in legislation or constitutions. Court decisions in the public law area represent judicial efforts to resolve disputes about such questions as the meaning of statutes, and whether regulations promulgated by administrative agencies fit within the purpose of the statutes under which they were issued.<sup>35</sup>

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“Belonging to, made or authorized by, acting for or on behalf of, the whole university (as distinguished from the colleges or other constituents): as public disputation, examination, lecture, schools, hall, theatre, library . . .” *Id.* at 779 (italics omitted).

30. *Id.*

31. HELENE SHAPO & MARSHALL SHAPO, *LAW SCHOOL WITHOUT FEAR* 12 (2d ed. 2002).

32. *Id.*

33. *Id.*

34. *Id.* (internal quotation marks omitted).

35. *Id.* As the authors explain in detail:

Courts dealing with [public law] problems of this sort do not start with rules that they have developed themselves—that is, common law. They begin, instead, with enacted law such as legislation and constitutions. When questions arise about the interpretation of legislation, *the main issue usually is what the legislature, acting on behalf of the political community as a whole, should be taken to mean by a statute.* . . .

When you study public law and statutes generally, you should keep in mind how powerfully some legislation manifests the deeply held views of the electorate. Consider legislation as technical as the Internal Revenue Code. The rates of taxation it sets, the exemptions it creates, the deductions it allows—all these represent highly political declarations of preference about such matters as the distribution of wealth in society and the desirability of particular activities. . . .

Another facile way of distinguishing between the concepts of public law and private law is to think of them as spheres. As explained by Michael Taggart, the “public law sphere” has a “starting premise [which] is public or other-regarding behaviour,” while the “private law sphere” has a “starting-point [which] is self-regarding behaviour.”<sup>36</sup> Perhaps the most scholarly exposition of the difference between public law and private law was articulated by the late Professor Rudolf B. Schlesinger (my Civil Procedure professor at Cornell). According to Schlesinger, the ancient Roman text of the Emperor Justinian’s *Corpus Iuris* “centered on private law, and public-law issues were discussed, where appropriate within the framework of private law analysis.”<sup>37</sup> Some important examples of ancient Roman public law “included rules governing public property such as roads and waterways, and contracts made by public authorities. The special nature of these rules was frequently explained in terms of *utilitas publica*, or public concern.”<sup>38</sup> The law of ancient Rome evolved in the countries of continental Europe. “Public law as a discrete [modern] subject essentially . . . [was] the twin product of the early-modern territorial state and the Reformation”<sup>39</sup> of the sixteenth century. Public law as a continental European field of study, in turn, branched into several discrete streams, explained by Schlesinger as follows:

[Starting in the 16th century], [w]hile Roman law continued to furnish the basic vocabulary and some key notions, early modern public lawyers based their craft mainly on neo-Aristotelian “politics,” natural-law theory, Machiavellian or anti-Machiavellian literature or statecraft and Staatsraison, and more immediately, the actual texts of charters, privileges, capitulations, pacts and enactments. As the European state-system moved away from imperial and papal supremacy to the sovereign equality of independent territorial states interconnected by treaty and diplomatic relations, public lawyers became active as diplomats and as authorities on public international law. Several of the initial chairs of

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Other kinds of legislation do not even mask their social purposes: statutes prohibiting discrimination on the basis of race and gender, laws restricting the conduct of both employers and workers in labor disputes, legislation requiring notification of the parents of minors seeking abortions. When you deal with the rules embodied in statutes of this kind, you know you are dealing with public law.

*Id.* at 12-13 (internal quotation marks omitted) (emphasis added). Cf. MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* (2004) (arguing that public law must be treated as a special and autonomous subject and that the root cause of many of the difficulties and controversies that have arisen within both contemporary jurisprudence and also in the practice of public law have arisen because this argument has been neglected).

36. Michael Taggart, *The Nature and Functions of the State*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* 101, 106 (Peter Cane & Mark Tushnet eds., 2003).

37. RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 272 (6th ed. 1998).

38. *Id.* at 272-73 (footnotes omitted).

39. *Id.* at 273 (footnote omitted).

public law created in the 18th century (e.g., Edinburgh 1708) encompassed the "law of nature and of nations" in addition to public law generally.

By the 19th century, public international law had distinguished itself as a distinct academic specialty. The practice of adopting formal instruments of government called "constitutions," which the United States initiated in 1787 and which generally caught on in 19th-century Europe and Latin America, gave rise to national constitutional law as a separate discipline, with its own professorships, treatises, and doctrinal systems. Reflecting the need for systematizations of increasingly complex governmental operations affecting individual and group rights and interests, administrative law came into its own later that century.<sup>40</sup>

### *B. A Modern Functional Approach*

The legendary late Professors Henry M. Hart, Jr., and Albert M. Sacks, in their enduring classic, *The Legal Process: Basic Problems in the Making and Application of Law*,<sup>41</sup> provide assistance in the search for a modern, practical conception of what it means to be an American public lawyer. First, their description of "[g]overnment lawyers"<sup>42</sup>—what we might amplify to encompass full-time, professional staff attorneys for public officials of federal, state, or local governmental bodies (executive, legislative, or judicial)—takes in a broad swath of what we would unanimously recognize as being public lawyers. As eloquently explained by Hart and Sacks:

Government lawyers, of course, have a wide variety of responsibilities as advisers to other officials . . . . These responsibilities are akin to those of a private lawyer when he [or she] advises a private client, and they include the same inescapable residuum of personal responsibility which is inherent in the exercise of any profession. *Indeed, in the case of a government lawyer this personal responsibility not merely to give accurate advice but to try to guide decision so as to keep it within proper bounds has a special urgency, for a lawyer's client is not merely the official whose action is immediately in question but the government of which the official is a part and in some sense the whole society for which the government speaks.* Nevertheless, the power and the ultimate responsibility of decision in these situations belong to the official whom the lawyer advises. The lawyer acts essentially in a staff capacity, and has always to remember this.<sup>43</sup>

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40. *Id.* at 274-75 (footnotes omitted).

41. Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1047 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958).

42. *Id.*

43. *Id.* (emphasis added).

Second, Professors Hart and Sacks offer a more refined description of a fairly narrow category of American public lawyers: “When, however, the lawyer himself [or herself] is given the power of decision, he [or she] becomes a distinct and separately functioning unit in the institutional system, and this fact warrants special attention to his [or her] role in the operation of the system.”<sup>44</sup> Thus, most prominently, lawyers who hold high public office (the President of the United States, Vice President of the United States, members of the President’s cabinet and subcabinet, members of Congress, federal judges and magistrates, the governor and other statewide elected officials, members of a governor’s cabinet or subcabinet, members of the state legislature, and state court judges) are public lawyers with a special public trust.<sup>45</sup> Moreover, lawyer-officials, like an attorney general or a prosecutor, have uniquely important functions to perform as public lawyers. Thus, an attorney general (of the United States or of a state) is viewed as “the chief law officer” of a jurisdiction, and has responsibilities which include “preparing formal legal opinions,” suing on behalf of the government in various civil and criminal matters, “defen[ding] of lawsuits against the government,” “interven[ing] on the government’s behalf,” and “appear[ing] as an *amicus curiae* in private litigation.”<sup>46</sup> A prosecutor makes vital decisions “in determining whether to institute [criminal] litigation on the government’s behalf.”<sup>47</sup>

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44. *Id.*

45. See generally AMERICA’S LAWYER-PRESIDENTS: FROM LAW OFFICE TO OVAL OFFICE (2004) (discussing how the experiences of America’s twenty-five lawyer-presidents affected and shaped their presidencies).

46. HART & SACKS, *supra* note 41, at 1047.

47. *Id.* at 1048. Referring to the awesome power and responsibility of a government prosecutor, Attorney General (later Justice) Robert Jackson wrote:

There is a most important reason why the prosecutor should have . . . a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn’t blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor; that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then

Besides government lawyers at the federal and state levels, Professors Hart and Sacks show us—through a series of problems in their book—that attorneys for a local government body, such as a city solicitor or counsel to a municipal health commissioner, can face potentially far-reaching responsibilities as public lawyers. Thus, in one problem, Hart and Sacks, show how an attorney rendering advice on the enforcement of an ordinance on the hygiene of housing might be called upon to render difficult advice, implicating constitutional rights of regulated parties, in inspecting private dwellings for ordinance violations; might be asked for practical administrative input on designing a housing hygiene program; might be queried on what types of exemptions or postponements of enforcement should be viewed as a special hardship—and the like.<sup>48</sup> In another problem on public law responsibilities of municipal lawyers, Hart and Sacks explore the complexities of the breadth and depth of legal and policy advice that an attorney representing a municipal health commission considering amending its administrative regulations should be prepared to encounter.<sup>49</sup> I appreciate and

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looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of [the] prosecutor himself.

*Id.* at 1058 (citation omitted).

48. Problem No. 41, *Administrative Enforcement: An Experiment in Novel Techniques*, *id.* at 1061-74.

49. Problem No. 42, *Issuing an Administrative Regulation: Bathtubs in Baltimore*, *id.* at 1074-83. Some of the complex issues facing such a municipal public lawyer are suggested by Hart and Sacks as follows:

The Commissioner of Health has ordered that public hearings be held on the proposed regulations, so that he can hear from all interested groups prior to deciding whether to adopt the proposals.

The Commissioner asks you to assist him in preparing for the hearing. What witnesses should he invite and what facts should he try to ascertain as bearing on the desirability of the proposals? What considerations need to be taken account in arriving at a decision?

*Id.* at 1075. Moreover, the good local public lawyer advising a municipal health commissioner should be prepared for even more challenging public law questions from his client, as Hart and Sacks explain:

Assume that the [municipal health] regulatory scheme, even if useful, will be inadequate. What other devices are available to carry out the program? Consider the following:

(a) Inducements to private action may include an educational campaign, favorable tax treatment, government loans at low interest rates, provision of technical assistance to the

admire the wisdom of Hart and Sacks in describing and prescribing the multiple responsibilities that public lawyers face every day—from the White House to the local school board. Reflecting on my former personal experience as counsel for several school boards and for a local planning board in New Jersey, I can personally attest that the role of being a public lawyer—even, as it was for me, part-time and in addition to my duties as a private lawyer with a diverse clientele of private parties—is both daunting and exhilarating.

### *C. Stretching the Limits: Public Law Dimensions of Private Lawyering*

If we were to take a capacious view of what it means to be a public lawyer, we would have to consider a few other matters. First, in 1921, a Carnegie Foundation study entitled *Training for the Public Profession of the Law* suggested eponymously that all lawyers are in some sense public lawyers because of the centrality of the practice of law to American government and social order.<sup>50</sup> This view has been carried forward in state rules of professional conduct. Indiana's approach is illustrative. Indeed, consider the public lawyer intonations in the preamble to *Indiana's Rules of Professional Conduct*:

- [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably.

...

- [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer

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homeowner in planning his repairs, and perhaps regulation and supervision of building contractors to give assurance that all work is adequately done at a fair price. Note that these various inducements may present distinctive problems of their own.

(b) Municipal action in providing new or improved public facilities and services, including better streets, parks, lighting, trash collection, etc.

(c) Condemnation of properties for the purpose of having the necessary repairs done either with public funds or by private persons who buy the property from the municipality under an agreement to make such repairs.

*Id.* at 1082-83.

50. See discussion in *THE OXFORD COMPANION TO AMERICAN LAW* 280 (Kermit L. Hall ed., 2002).

should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.<sup>51</sup>

Second, "even private law has public law aspects."<sup>52</sup> To be sure, "[o]nce courts employ notions of public policy in judging private disputes, explicitly taking into account the broader consequences of their decisions, they are importing 'public' characteristics into private law."<sup>53</sup> And public policy analysis—as a type of legal argument—has assumed great importance in recent years. For instance, Professor Wilson Huhn has suggested that policy arguments in the law have an appealing, modern sensibility because—unlike argumentation that looks chiefly to the past as authority for a legal proposition—public policy focuses our attention on the future.<sup>54</sup> By way of further illustration of the increasing concern for broadening our understanding of the social consequences of law, Professor Lynne L. Dallas has edited an entire casebook on law and public policy; among the policy-laden, wide-ranging, future-oriented topics that she explores are law and cognitive psychology, economic fairness and well-being, norms and the law, and the role of cooperation and trust in legal constructs and institutions.<sup>55</sup>

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51. INDIANA RULES OF PROF'L CONDUCT, Preamble ¶¶ [1], [6] (2005).

52. SHAPO & SHAPO, *supra* note 31, at 13 (citing Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1 (1959); 38 TEX. L. REV. 257 (1960)) (internal quotation marks omitted).

53. *Id.* For my own take on the public policy/public law dimensions of modern tort law, see Robert F. Blomquist, *Re-Enchanting Torts*, 56 S.C. L. REV. 481 (2005).

54. WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 51 (2002).

55. LAW AND PUBLIC POLICY: A SOCIOECONOMIC APPROACH (Lynne L. Dallas ed., 2005). Dallas's take on public policy is explained as follows:

This textbook provides rich course materials that permit students to explore in a variety of contexts the interrelationships between law and economic/social processes. It critiques neoclassical economics and draws on diverse economic approaches and other social sciences, such as psychology, sociology, anthropology and political science, for the tools of public policy analysis. It offers students a values-based approach to public policy that is designed to take into account the power implications and distributional effects of laws, and stresses the importance to effective regulation of attention to historical context, philosophical beliefs, culture, existing institutions, working rules and

Third, with the trend in recent decades of the prominence of non-governmental organizations (“NGOs”), and their need for *pro bono* legal representation in pursuing public missions, ranging from environmental protection to advocacy for the disabled, from child welfare to historic preservation, lawyers who take on these charitable clients will be called upon to consider broad questions of public interest. Thus, it may be the case that the traditional dichotomy between the public interest serving role of attorneys for governmental entities and the appropriate professional role for attorneys for non-governmental parties will continue to blur in the future.<sup>56</sup>

II. TEN VITAL LAWYERLY VIRTUES

A. *To Be Positive or Negative?*

One way of approaching the general question of what it means to be a “good” or “worthy” lawyer would be to back into the subject, so to speak, by identifying the key vices we would want our ideal lawyer to avoid. Thus, a potential way of describing a virtuous lawyer might be to catalog bad qualities—like greed, sloth, or anger, for example—for our worthy lawyer to avoid. What is left, like a cardboard silhouette portrait, would define our legal professional.<sup>57</sup> Although such a negative approach would provide us with a general notion that an ideal lawyer should aspire to achieve the opposite of the prohibited vice (e.g., to avoid anger and seek calmness; to avoid sloth and try to be diligent), a more positive approach of trying to articulate specific characteristics of a good lawyer is more appealing. In the first place, a positive description allows us to focus on—and better visualize—the key attributes of specific virtues and why they are important for lawyers to strive to master. In the second place, focusing on private virtues instead of negative vices allows us to move toward a vision of an ideal image instead of away from the specter of a boogeyman. In my judgment, more people

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sources of power.

*Id.* at xxiv. Compare Dallas’s book with the similarly free-wheeling, values-oriented approach—from a political scientific perspective—of FRANK FISCHER, *REFRAMING PUBLIC POLICY: DISCURSIVE POLITICS AND DELIBERATIVE PRACTICES* (2003) (containing a special emphasis on a deeper understanding of language and discourse in the formulation of public policy).

56. Cf. Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest*, 41 B.C. L. REV. 789, 796 (2000) (discussing that “[t]he traditional understandings of the [public interest serving] role for attorneys for private parties . . . to take into [some] account the public interest, [but] this responsibility is greatly subordinated to the attorneys’ responsibility to advance the individual self interests of their clients”).

57. For a fascinating—and often humorous—series of general meditations on six of the seven deadly sins, or vices, see SIMON BLACKBURN, *LUST: THE SEVEN DEADLY SINS* (2004); JOSEPH EPSTEIN, *ENVY: THE SEVEN DEADLY SINS* (2003); FRANCINE PROSE, *GLUTTONY: THE SEVEN DEADLY SINS* (2003); ROBERT A.F. THURMAN, *ANGER: THE SEVEN DEADLY SINS* (2004); PHYLLIS A. TICKLE, *GREED: THE SEVEN DEADLY SINS* (2004); WENDY WASSERSTEIN, *SLOTH: THE SEVEN DEADLY SINS* (2005).

are motivated by the former instead of the latter. Finally, while lambasting lawyerly vices might yield some brief sardonic laughter (along the lines of a typical lawyer joke),<sup>58</sup> in the long run, extolling virtues is more uplifting and better for the human spirit.

### B. A Ranked List

Every lawyer—private lawyer, public lawyer, or law student/aspiring lawyer—should seek to master ten vital lawyerly virtues in order to perform his or her awesome professional responsibilities in an efficient, effective, and honorable manner, and for the further purpose of ensuring a sustainable career over time.

I provide below a pithy synopsis of these ten universal lawyerly virtues and a brief explanation of why each virtue is ranked the way that it is on my list.<sup>59</sup>

1. *Balance*.—Psychological and spiritual teachings increasingly suggest that a healthy individual is one who is able to balance his or her *personal life* (health, spouse, lover, children, family, friends) with his or her *professional life* (money, competence, achievement, colleagues, advancement) and with something less concrete than these concerns: *spiritual life*. Being balanced is not quite the same thing as being organized; being organized, though, is a good place to start since it is a bit easier to think about than the abstract quality of balance. Balance, however, is a virtue that goes beyond being organized. Balance is also poise. Balance is control: of one's emotions, of one's work, of one's time, of one's thoughts. It is imperturbability and unruffledness that conveys a fundamental attitude that Rudyard Kipling alluded to in his famous poem, *If*: keeping your head when all around you are losing theirs.<sup>60</sup> Balance is a frame of mind that communicates in a non-verbal way: "I *know* that I know"; "I *care* about you enough to tidy up a bit"; "I am *glad* that I have the opportunity to create some harmony in both of our lives."

Without balance there can be little accomplishment. Doing all the things that lawyers must do with their limited time and daunting demands requires balance. Balancing—as the nineteenth century English poet Samuel Taylor Coleridge

58. See TED COHEN, JOKES: PHILOSOPHICAL THOUGHTS ON JOKING MATTERS 73-74 (1999) (bold omitted). Cohen explains:

Sometimes the established presumption is not that the principal character is stupid or inept, but that he is disagreeable—mean, nasty, vicious. And sometimes that is all there is to the presumption, as in a number of jokes about . . . lawyers. For instance, . . .

You find yourself trapped in a locked room with a murderer, a rapist, and a lawyer. Your only hope is a revolver you have, with two bullets left. What do you do?

Shoot the lawyer. Twice.

59. For more detailed accounts of these ten lawyerly virtues, see my book, *supra* note 18, and accompanying text.

60. RUDYARD KIPLING 49 (Geoffrey Moore ed., 1992).

reminds us—requires both hard work and imagination. As Coleridge observed:

[Imagination] reveals itself in the balance or reconciliation of opposites or discordant qualities; of sameness, with difference; of the general, with the concrete; the idea with the image; the individual with the representative; the sense of novelty and freshness, with old and familiar objects; a more than usual state of emotion, with more than usual order. . . .<sup>61</sup>

Maintaining balance, then, is the first virtue of a good lawyer since without balance, work, and professional accomplishment become top-heavy and unsustainable over the long haul.

2. *Integrity*.—Integrity is a double-edged virtue for lawyers. In the first place, integrity is all about being *upright*—exhibiting decency, honor, principle, morality, and goodness. The second edge of integrity, however, relates to *wholeness*. Integrity, in this sense, is defined as totality, completeness, unity, oneness, togetherness, coherence, consistency and validity.

To appreciate the importance of integrity to the ultimate success of a lawyer, a brief explanation of Aristotle's theory of rhetoric is instructive.<sup>62</sup> The persuasiveness of any speech, according to Aristotle, depends on a combination of three essential elements that must be blended into a single whole: *logos*, *ethos*, and *pathos*. *Logos* encompasses the logical force of an argument—the facts and figures and inferences and deductions to be drawn from the evidence. *Ethos* is fashioned by the reputation of the advocate—his or her renown for good deeds, truth-telling, and honest dealing. *Pathos* involves the emotional force of the argument—the human drama of conflict and tragedy and of suffering and striving. To Aristotle's way of looking at advocacy, the success or failure of a pleader of causes depends on the unity of logic, reputation, and emotion leading to an unshakable conviction (in the listener) that the champion of an argument is a person of upright character. Aristotle's illuminating theory of persuasion through integrity—rightly understood as the *gravitas* or substance that comes about when the sum of logic, emotion, and reputation turns out to be greater than the sum of the parts—applies to *everything* a lawyer does. There is no better American exemplar of the importance of integrity to the ultimate success of a lawyer than the record of Abraham Lincoln's twenty-three years as a practicing lawyer in Illinois before his election to the presidency in 1860.<sup>63</sup>

3. *Idealism*.—Idealism is the fuel that powers acts of lawyerly service and sacrifice. Every act of idealism—quixotic, romantic, optimistic, starry-eyed, or visionary advocacy for a cause, a person, or an institution—expresses a lawyer's highest self. And every missed opportunity to be idealistic diminishes a lawyer's opportunity to make a difference in his chosen profession.

61. SAMUEL TAYLOR COLERIDGE, *BIOGRAPHIA LITERARIA*, ch. 14 (1817).

62. For an excellent short book on Aristotle's theory of rhetoric, see MORTIMER J. ADLER, *HOW TO SPEAK HOW TO LISTEN* 29-45 (1983).

63. For a superb account of Lincoln's virtuous life, both as a practicing lawyer and as a statesman, see WILLIAM LEE MILLER, *LINCOLN'S VIRTUES: AN ETHICAL BIOGRAPHY* (2002).

Lawyerly idealism is similar to idealism as a philosophical concept in that both emphasize the importance of “spirit” or “consciousness” in viewing the world.<sup>64</sup> Thus, both the idealistic lawyer and the philosopher of idealism would agree that it is possible to transcend the here and now. In particular, the virtue of idealism allows the lawyer to contend with injustice and bone-headed laws for as long as it takes to reverse a client’s misfortune. Moreover, the idealistic lawyer and the philosopher of idealism would join with one another in the Hegelian belief that the universe is governed by a dialectical invisible hand such that even bad can be transcended to produce good.

A proper understanding of idealism for a lawyer requires, in the first place, a facility for shrugging off defeat—for being able to continue to fight the good fight. In the second place, the virtue of lawyerly idealism demands that the accumulation of riches not be the focus of a career in the law. We should be mindful of what the late Robert F. Kennedy (who served as Attorney General of the United States under his brother, Jack, and who was elected a United States Senator from New York) said. According to RFK there is a need “to confront the poverty of satisfaction—a lack of purpose and dignity—that inflicts us all. Too much and too long, we seem to have surrendered community excellence and community values in the mere accumulation of material things.”<sup>65</sup> In the third place, idealism in the law requires a youthful attitude. “This world demands the qualities of youth: not a time of life but a state of mind, a temper of the will, a quality of the imagination, a predominance of courage over timidity, of the appetite for adventure over the love of ease.”<sup>66</sup>

4. *Compassion.*—According to the Once-ler, a character in my favorite Dr. Seuss book, *The Lorax*, as he surveys a landscape of denuded trees brought about by his own avarice:

“But now,” says the Once-ler, “Now that *you’re* here, the word of the Lorax seems perfectly clear. UNLESS someone like you cares a whole awful lot, nothing is going to get better. It’s not.”<sup>67</sup>

Michael N. Dolich, a young Pennsylvanian lawyer who has embraced the concept of being a “holistic lawyer,” seems to mirror the Lorax’s credo of *caring*. According to Dolich, holistic lawyers understand “how [their] thoughts and actions impact others and the whole world.”<sup>68</sup> Holistic lawyers learn that “the quality that elevates us from being a great lawyer and moves us into the next level is *simply caring*.”<sup>69</sup> Dolich came to his insight after a period of travel,

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64. For a brief discussion of the importance of spiritual values in law, see Robert F. Blomquist, *Law and Spirituality: Some First Thoughts on an Emerging Relation*, 71 UMKC L. REV. 583 (2003).

65. MAKE GENTLE THE LIFE OF THIS WORLD: THE VISION OF ROBERT F. KENNEDY 79 (Maxwell Taylor Kennedy ed., 1998) (internal quotation marks omitted).

66. *Id.* at 82.

67. DR. SEUSS, *THE LORAX* 60 (1971).

68. Michael N. Dolich, *Finding Joy in the Practice of Law*, 25-FEB. PA. LAW. 34, 38 (2003).

69. *Id.* (emphasis added).

study, and reflection triggered when he quit his lucrative personal-injury law practice, sold his home, and stored all of his possessions in his friend's basement. He made the following startling assertion which, at its heart, emphasizes the importance of lawyerly compassion as a professional virtue:

Most of us are not aware of how meaningful our job really is. I am not writing about an intellectual exercise in how the legal system impacts our culture, for we all know that it does. The new challenge facing our profession is finding a way to experience, in a fully conscious way, how our actions and thoughts impact each and every other person in the never-ending web of relationships called life. In essence, I am referring to the conscious evolution [lawyers must go through] from intellectually knowing our work has meaning into the actual experience and feeling of such meaning. When this happens our work [as lawyers] becomes joyful.<sup>70</sup>

Steven Keeva, author of the book *Transforming Practices: Finding Joy and Satisfaction in the Legal Life*,<sup>71</sup> has pointed out how lawyers' lack of compassion and empathy for clients can get in the way of their ability to render good legal advice and care. As he wrote in a recent article:

My impression, born out in interviews with clients over the years, is that what troubles so many of them is a sense that certain mindsets and attitudes stand between them and the lawyers they hire. Several implied questions are clear including: *why can't they (i.e. lawyers) just talk to me like normal human beings? What is it about practicing law that makes people so unreal, so detached from the rhythms and concerns of everyday life?* I believe the research suggesting that non-lawyers see lawyers "as dominant and aggressive professionals who are lacking in caring and compassion," supports my impression, since "real" people let their guards down now and then and do not frame every situation in dry, legalistic terms. *They understand that people who come to them in need, often at moments of great suffering, can use a strong, but also caring hand.*<sup>72</sup>

5. *Courage*.—Every practicing lawyer will likely face moments when he or she is called upon to face fears, stand up for what is right, or dig down deep to find the mystic fire of courage to do what must be done. Courage is a lawyerly virtue of great importance because lawyers are frequently called upon to represent unpopular clients or causes. And sooner or later a lawyer will have to argue for acceptance of a novel legal argument before a court or legislative body or administrative agency.

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70. *Id.* at 34.

71. STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (2002).

72. Steven Keeva, *Practicing From the Inside Out*, 7 HARV. NEGOT. L. REV. 97, 101-02 (2002) (emphasis added) (footnotes omitted).

A good place to start our search for the meaning of lawyerly courage is with the thoughts of a University of Michigan law professor, William Ian Miller, in his book *The Mystery of Courage*.<sup>73</sup> This meditation on courage starts off with a chapter that draws upon a battlefield memoir of a Union soldier during the Civil War. Miller notes that those who have discussed the meaning of courage “place it either first among virtues” or close to the top.<sup>74</sup> He observes, in this regard, that “[c]onstrued narrowly as the capacity to face death in feud or war, courage was frankly granted to be necessary to defending self, family, and one’s own against external threat, and thus absolutely crucial to securing the space in which other virtues could develop.”<sup>75</sup> Moreover, Miller reflects that courage “[c]onstrued more broadly as fortitude . . . denote[s] a certain firmness of mind, a necessary component”<sup>76</sup> of all virtues. In a fascinating series of questions about the ambiguities of battlefield courage, Professor Miller provides us lawyers with food for thought about the nature of lawyerly courage:

[Courage] is clearly intimately connected with fear, but how? Does true courage mean possessing a fearless character, being a person who “don’t scare worth a damn” as one soldier said of Ulysses S. Grant; or does it require achieving a state of fearlessness by overcoming fear so as to send it packing by whatever feat of consciousness or narcotic that can do the trick? Or does overcoming fear mean never quite getting rid of it, but putting it in its proper place so that it doesn’t get in the way of duty? Or does it mean being gripped by fear, feeling its inescapable oppressiveness, its temptations for flight and surrender, yet still managing to perform well in spite of it?<sup>77</sup>

We can also gain edification from looking at the quality of political courage as an analogue of lawyerly courage. Indeed, every lawyer should peruse John F. Kennedy’s *Profiles in Courage*.<sup>78</sup> This book is instructive for lawyers not only because it portrays an assemblage of politicians who were also trained as lawyers (such as John Quincy Adams, Daniel Webster, and Robert A. Taft) but also because it discusses the kinds of cases and controversies that practicing lawyers—through their representation of controversial clients or causes—sooner or later get involved with.

A final thought in our brief summary of the lawyerly virtue of courage comes from Bruce R. Jacob who calls courage “[o]ne of the most important character traits of outstanding lawyers,” a trait, which in his view, is “[c]losely related [to] the trait of independent-mindedness.”<sup>79</sup>

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73. WILLIAM IAN MILLER, *THE MYSTERY OF COURAGE* (2000).

74. *Id.* at 5.

75. *Id.*

76. *Id.* (internal quotation marks omitted).

77. *Id.* at 6 (footnote omitted).

78. JOHN F. KENNEDY, *PROFILES IN COURAGE* (1956).

79. Bruce R. Jacob, *Developing Lawyering Skills and the Nurturing of Inherent Traits and Abilities*, 29 STETSON L. REV. 1057, 1058 (2000).

6. *Creativity*.—The virtue of creativity for lawyers is critically important. Yet, for at least three reasons, lawyerly creativity is under-appreciated. One reason is that some view the law as an inherently restraining—rather than a liberating—discipline that necessarily stifles innovation. Second, many observers contend that the need for specialization and sub-specialization (to manage the torrent of complex new statutes, case law, and regulations) compels a narrowness of focus that inhibits inventiveness and originality. A third reason for the conventional professional wisdom that severely discounts the role of creativity in the practice of law is the time pressures faced by every lawyer in America just to keep up and stay reasonably current. If one needs to run just to stay in place, this line of thinking goes, it is unrealistic to expect ingenious and imaginative lawyerly insights.

To the contrary, however, if we shift our perspective a bit, the limitations of the law, the need for specialization, and the constraints of time on the practice of law become environmental forces that compellingly emphasize the need for creativity in the law. In this regard, law can be analogized to the ancient art of rhetoric. Both law and rhetoric involve the study and mastery of the available means of persuasion in a given case. The good lawyer must learn how to creatively navigate amid the constraints posed by his audiences and situations, while remaining poised to take advantage of situational opportunities that present themselves.

Professor Wilson Huhn's masterful book, *The Five Types of Legal Argument*, is, at its heart, a call for lawyerly creativity.<sup>80</sup> Huhn explains that it requires creativity and inventiveness to fashion five basic types of legal argument, applicable across the board in every specialty of law from admiralty to zoning: (1) *text*-based arguments, (2) claims based on *intent*, (3) *precedent*-focused contentions, (4) arguments rooted in *tradition*, and (5) *policy analysis*.<sup>81</sup> Huhn points out in this regard that since "[t]he law is not smooth and pure like distilled water," but, rather, is like a "wild river" that is "fed by tributaries which arise from myriad wellsprings," and in order "[t]o master the law" we must imaginatively "trace each and every legal argument to its source."<sup>82</sup> Utilizing creativity himself, Professor Huhn provides an alternative image of the law as consisting of "different voices."<sup>83</sup> Thus, he concludes that "the greatest challenge we face in studying the law is to recognize and understand each of the voices of the law, and to express ourselves with every voice."<sup>84</sup>

Edward DeBono provides some practical ideas for applying the lawyerly virtue of creativity in our day-to-day lives as professionals. In his brilliant book, *Six Thinking Hats*, DeBono advocates breaking problems down into different

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80. HUHNS, *supra* note 54.

81. See generally *id.* at 13-16 (pointing out that the five types of legal argument: "Arise from Different Sources of Law," "Function as Rules of Recognition," "Are Rules of Evidence for Determining What the Law Is," and "Embody the Underlying Values of Our System of Laws").

82. *Id.* at 3.

83. *Id.*

84. *Id.*

parts and then dealing with each part separately.<sup>85</sup> Different colors are used to describe the different dimensions of a problem: “red for emotions, white for facts, yellow for positive, green for future, black for critique, and blue for process.”<sup>86</sup> Applying DeBono’s methodology to the practice of law, clinical law professors Weinstein and Morton suggest:

[L]awyers . . . have the tendency to immediately critique ideas with our black hats; if we first explore the emotional aspects of an issue (red hats), it is easier to separate our anger or other feelings from other components of the issue. Or, it might be best to first explore the positive aspects of the problem (yellow hats), if we are dealing with a problem that seems to be *very* negative. It is often good to start with the facts (white hats).<sup>87</sup>

7. *Energy*.—Lawyers require energy to accomplish their busy agendas. The dictionary definition of *energy* informs us of the multiple meanings of the word: “force; vigor; capacity for activity” and “the capacity . . . to do work.”<sup>88</sup> Synonyms for *energy* are more revealing: “force, power, strength, might . . . , drive, dynamism, push, *élan*, dash, bounce, brio, zip, go, vim, . . . get-up-and-go, pep, zing, zap, vitality, liveliness, vivacity, animation, . . . spirit, exuberance, zest, gusto, enthusiasm, verve, zeal, . . . oomph, [and] pizzazz.”<sup>89</sup>

On a deeper level than dictionary definitions, Professor P.M. Forni has articulated a more practical description of what human energy is all about. Forni speaks of energy in social terms; focusing on a coming out of self to embrace the interests and concerns of others. As he explains:

We now live in an age of idolatry of the Self. We have persuaded ourselves that first and foremost we live to realize our own Selves for our own good. Having made the Self the central concern and value in our lives, we should not be surprised if self-centered behaviors have become more prevalent than altruistic ones. We shouldn’t be surprised if civility has suffered. The more we focus on our Selves and our self-gratification, *the less moral energy we have available to spend on others and the less attuned we are to others’ well-being*.<sup>90</sup>

Two aspects of Forni’s description should resonate with those of us who labor in the law: the implication that people should try to be more altruistic than self-centered, and the notion that energy applied by human beings to fellow human beings is moral in nature. In other words, when a lawyer chooses to

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85. EDWARD DEBONO, SIX THINKING HATS (1985).

86. Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 CLINICAL L. REV. 835, 856 (2003) (describing DeBono’s book).

87. *Id.* at 856 (emphasis added).

88. THE OXFORD DICTIONARY AND THESAURUS 476 (Am. ed. 1996).

89. *Id.*

90. P.M. FORNI, CHOOSING CIVILITY 169 (2002) (emphasis added).

represent a client or a cause, she or he steps outside of herself or himself to achieve something of importance to another. The tasks of finding, interpreting and using legal materials are actually outside of a client's *real* concerns in the sense that an attorney should strive to frame a client's problem in human terms *before* he or she defines the client's problem in legal terms.

The philosophy of Henri Bergson helps to clarify the importance of energy in a lawyer's day-to-day existence. Bergson coined the phrase *élan vital*. Although a precise meaning of *élan vital* is subject to speculation among philosophers, for our purposes, it can be thought of as "life force" or "vital impetus"<sup>91</sup>—what one writer describes as a "basic energy [that] has no specified or specifiable goal; it is a creative and originating force which produces endless variations of forms against which it then has to contend in order to create further variations."<sup>92</sup> Another formulation of Bergson's philosophy of energy is that "[l]ife is essentially determined in the act of avoiding [or overcoming] obstacles, stating and solving a problem."<sup>93</sup> A lawyer, then, needs to understand that *problem formulation* is a critical part of what he does and that searching for ways to describe and present a client's problem is a difficult and taxing process. Yet, Bergson's insight provides some comfort: he was of the opinion that God is imminent in the world and the prime source of energy. Moreover, "Bergson maintained that God operates with complete freedom in unfolding the process of evolution, that God, like an artist who works completely unrestricted by outside forces, freely chooses each new step of creative activity as he develops successive stages of the evolutionary process."<sup>94</sup>

8. *Justice*.—The lawyerly virtue of justice is dominated by physical and visceral characteristics. A compelling book that supports this presupposition is entitled *The Sense of Justice: Biological Foundations of the Law*.<sup>95</sup> According to Margaret Gruter, although "law [is] both . . . a creation of the human mind and . . . a product of the biological mechanisms that support and make possible the human quest for order and justice,"<sup>96</sup> the human "sense of justice" seems to be hard-wired into our very makeup as human beings. As Roger D. Masters asserts, what a human tends to have as a natural component of his or her being "combine[s] elements of passion and reason, emotion and cognition, or feeling and judgment . . . [involving] a sense of justice, a sense that is ever present yet manifest in different ways from case to case."<sup>97</sup>

91. See generally HENRI BERGSON, *CREATIVE EVOLUTION* (A. Mitchell trans., 1928).

92. DIANE COLLINSON, *FIFTY MAJOR PHILOSOPHERS: A REFERENCE GUIDE* 132 (1987).

93. GILES DELEUZE, *BERGSONISM* 16 (Hugh Tomlinson & Barbara Habberjam trans., Zone Books 1988).

94. WILLIAM S. SAHAKIAN & MABEL LEWIS SAHAKIAN, *IDEAS OF THE GREAT PHILOSOPHERS* 95 (1993).

95. *THE SENSE OF JUSTICE: BIOLOGICAL FOUNDATIONS OF LAW* (Roger D. Masters & Margaret Gruter eds., 1992) [hereinafter *THE SENSE OF JUSTICE*].

96. Margaret Gruter, *Preface to THE SENSE OF JUSTICE*, *supra* note 95, at vii.

97. Roger D. Masters, *The Problem of Justice in Contemporary Legal Thought*, in *THE SENSE OF JUSTICE*, *supra* note 95, at 3.

For a lawyer, the virtue of justice is vital. Some might argue that a just lawyer is a tautological concept—how could a lawyer be other than just? And yet, from the lay public's perspective, the legal profession is *dominated* by lawyers who lack a sense of justice. Those who hold this view embrace the negative beliefs that lawyers care more about getting money for themselves than doing right for their clients; that lawyers will distort the facts and warp the law in pursuit of wealth maximization for themselves. This is the very antithesis of seeking justice.<sup>98</sup>

Despite many bad apples in the legal profession, I am convinced that there are more good lawyers who believe in and actively pursue justice. Indeed, many American lawyers provide *pro bono* representation for needy individual and nonprofit organizations. They willingly undertake hours of unpaid legal labor with no expectation other than seeking justice for an underdog. Nonetheless—almost as if the universe responds to generosity by giving back interesting experiences, challenging work and, sometimes, paying clients—a lawyer will sometimes do well by doing good. An illuminating book that supports this assertion is *Inside: A Public and Private Life*<sup>99</sup> by Joseph A. Califano, Jr. Califano started his legal career in government service during the Kennedy and Johnson administration, and his governmental perspective and political involvement allowed him to gain experience for a very influential case. He represented the Democratic National Committee (“DNC”), without a fee, during the early 1970s in a civil action against various Republican Party officials in the Nixon Administration involved in the illegal break-in of the DNC Headquarters in the Watergate Building. This public-spirited legal work was its own reward for Califano, but it also led to exposure and publicity that netted some influential, fee-paying clients for his law firm. Moreover, when Jimmy Carter won election to the White House in 1976, Califano was appointed Carter's Secretary of Health, Education and Welfare.<sup>100</sup>

Philosopher André Comte-Sponville observed that the virtue of justice is unique and yet elusive.<sup>101</sup> He says, in pragmatic fashion, that “just people are those who do not know what justice is and who recognize that they do not know it; they render justice as best they can, not exactly blindly . . . but with an understanding of the risks (more for others than for themselves) and the

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98. St. John's University law professor Lawrence Joseph has written a book—a cautionary tale about lawyers who have lost their sense of justice—that every lawyer in America should read (and re-read). See LAWRENCE JOSEPH, *LAWYERLAND: WHAT LAWYERS REALLY TALK ABOUT WHEN THEY TALK ABOUT LAW* (1997). Professor Joseph portrays a hodge-podge of grasping, self-absorbed, money-obsessed, petty, vindictive, and hollow attorneys who sneer or despise the idea that lawyers should be concerned about doing justice.

99. JOSEPH A. CALIFANO, JR., *INSIDE: A PUBLIC AND PRIVATE LIFE* (2004).

100. Califano's public lawyer experiences as HEW Secretary are detailed in his excellent book, JOSEPH A. CALIFANO, JR., *GOVERNING AMERICA: AN INSIDER'S REPORT FROM THE WHITE HOUSE AND THE CABINET* (1981).

101. ANDRÉ COMTE-SPONVILLE, *A SMALL TREATISE ON THE GREAT VIRTUES* 61 (Catherine Temerson trans., 1st Am. ed. 1996).

uncertainties.”<sup>102</sup> With French insight and élan, Sponville claims:

The Self is unjust in itself, writes Pascal, since it makes itself the center of everything; it is inconvenient to others since it would enslave them; for each self is the enemy and would like to be the tyrant of all others. Justice is the opposite of this tyranny, and hence (like other virtues) the opposite of, or the refusal to give into, selfishness and self-centeredness.<sup>103</sup>

9. *Discipline*.—According to management and inspirational guru Stephen R. Covey, discipline is an essential virtue for those who want to succeed in business and in life.<sup>104</sup> As he explains in his most recent book: “*Discipline* is paying the price to bring vision into reality. It’s dealing with the hard, pragmatic, brutal facts of reality and doing what it takes to make things happen.”<sup>105</sup> Moreover, according to Covey, “[d]iscipline arises when vision joins with commitment. The opposite of discipline and the commitment that inspires sacrifice is *indulgence*—sacrificing what matters most in life for the pleasure or thrill of the moment.”<sup>106</sup> Covey illustrates his conception of the disciplined individual (combining virtues of vision, conscience, and passion) with the biographies of George Washington, Florence Nightingale, Mohandas K. Gandhi, Margaret Thatcher, Nelson Mandela, and Mother Teresa.<sup>107</sup>

Poet Gary Snyder implicitly suggests a partially-western, partially-eastern definition of discipline as part of a learned craft when he talks of what is required for an apprentice. For aspiring Japanese potters or carpenters, for instance, Snyder notes that the first things they will learn are how to mix clay or how to properly sharpen chisels and planes before they even begin the process of shaping or creating.<sup>108</sup> According to Snyder, this disciplined craft learning is structural and cross-disciplinary, so the following insights apply to aspiring lawyers as well as aspiring mechanics, cooks, carpenters, and poets:

A master is a master. If you saw a man who was a master mechanic you’d do better—say you wanted to be a poet, and you saw a man that you recognized is a master mechanic or a great cook. You would do better, for yourself as a poet, to study under that man than to study under another poet who was not a master, that you didn’t recognize as a master.

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102. *Id.* at 67.

103. *Id.* at 74 (footnotes omitted) (internal quotation marks omitted).

104. He emphasized the centrality of disciplined habit formation in his classic book, STEPHEN R. COVEY, *THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE* (1989).

105. STEPHEN R. COVEY, *THE 8TH HABIT: FROM EFFECTIVENESS TO GREATNESS* 65-66 (2004).

106. *Id.*

107. *Id.* at 68-70.

108. *THE POET’S WORK: 29 POETS ON THE ORIGINS AND PRACTICE OF THEIR ART* 286 (Reginald Gibbons ed., 1979).

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Not only a true poet but a master—a *real* craftsman. There are true poets who can't teach because . . . they're not grounded in details. They don't *really* know the materials. A carpenter, a builder knows what Ponderosa pine can do, what Douglas fir can do, what Incense Cedar can do and builds accordingly. You can build some very elegant houses without knowing that, but some of them aren't going to work ultimately.

And so, I'm saying that behind the scenes there is the structural and the fundamental knowledge of materials in poetry, and learning from a master mechanic would give you some of those fundamentals as well as studying from an academician, say.<sup>109</sup>

As Gary Snyder sees it, a true "apprentice"—unlike the showy, brassy, reality TV version of the word—would take humble pains to master the details of his or her craft. Snyder's comments call on us to be mindful of details in our craft of the law: the details of step-by-step processes for accomplishing tasks; the details of the roots, branches, twigs, and leaves of knowledge in particular legal fields; the detailed exertions of a daily regimen; and the details of changing old, out-dated ways of doing things in favor of newer, more efficient, and more effective approaches to legal problems.

10. *Perseverance*.—A wise man once summed up the meaning of perseverance with a metaphor to a woodchopper: "Many strokes overthrow the tallest oaks."<sup>110</sup> Thus, one who perseveres continues a task "steadfastly or determinedly" persisting through what may come.<sup>111</sup> A word related to *persevere* is *persistent*, the latter meaning "continuing obstinately," "enduring," and in a scientific connotation when referring to horns or leaves, as "remaining instead of falling off in the normal manner."<sup>112</sup>

A dictionary listing or thesaurus cannot adequately convey the meanings of the human virtues of perseverance and persistence. I remember a case that I encountered early in my career as a lawyer, involving a marketing company, a disgruntled former employee, and a contractual covenant not to compete. Happily, the litigation ended with an amicable settlement between the parties. I do not even remember the precise facts or issues in the case. What I do remember is an inspirational quotation that my client—the owner of the marketing company—had printed up in fancy lettering and made sure all of his sales representatives took on the road to help them through the hard times. A former client gave me a quotation that I have had affixed to my office wall for the last twenty years. I learned later that the quote is attributable to Calvin Coolidge. It states:

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109. *Id.*

110. A.C. GRAYLING, MEDITATIONS FOR THE HUMANIST: ETHICS FOR A SECULAR AGE 37 (2002) (quoting John Lyly).

111. THE OXFORD DICTIONARY AND THESAURUS 1113 (Am. ed. 1996).

112. *Id.*

Nothing in the world can take the place of Persistence. Talent will not; nothing is more common than unsuccessful men with talent. Genius will not; unrewarded genius is almost a proverb. Education will not; the world is full of educated derelicts. Persistence and determination alone are omnipotent. The slogan “Press On” has solved and always will solve the problems of the human race.<sup>113</sup>

M. Scott Peck, M.D., author of the best-selling *The Road Less Traveled*,<sup>114</sup> has also put together a wonderful “anthology of wisdom,” entitled *Abounding Grace*.<sup>115</sup> An entire portion of the book is devoted to the virtue of perseverance. According to Peck’s analysis, perseverance can be broken down into the following “component virtues”: commitment, confidence, constancy, conviction, determination, devotion, diligence, endurance, patience, and perseverance.<sup>116</sup> Indeed, Peck synoptically refers to the virtue of perseverance as “the great virtue of seeing things through.”<sup>117</sup> He observes that the predominant theme of perseverance is “that if we persevere in ways that are not stupid or brain damaged, then we can achieve virtually any goal and succeed at any aim we desire.”<sup>118</sup> Peck reflects on a critical aspect of perseverance—what he refers to in legalistic terms as “due diligence.”<sup>119</sup> He writes: “The most frequent reason I have failed—or witnessed others fail—in an endeavor has been a lack of due diligence. We have simply failed to devote to the endeavor the amount of time, energy, thoughtfulness, or simple caring that the endeavor required.”<sup>120</sup>

The virtue of perseverance rounds out the top ten lawyerly virtues. Being able to hang tough and to endure setbacks and disappointments is crucial for a successful career in the law.

III. SOME SPECIAL VIRTUOUS CHALLENGES FOR PUBLIC LAWYERS

The aforementioned ten lawyerly virtues are essential for all lawyers to understand and to master. Public lawyers, however, face unique challenges in following these virtues in their professional lives. Five particularly special challenges that public lawyers face in pursuing virtue are discussed below.

A. *Life in a Fish Bowl*

Public lawyers usually find their professional lives much more open to outside scrutiny than private lawyers. The salary (or retainer arrangement) of a

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113. The Quotations Page, Quotation Details, <http://www.quotationspage.com/quote/2771.html> (last visited May 17, 2006).

114. M. SCOTT PECK, *THE ROAD LESS TRAVELED* (1978).

115. M. SCOTT PECK, *ABOUNDING GRACE: AN ANTHOLOGY OF WISDOM* (2000).

116. *Id.* at 6 (table of contents).

117. *Id.* at 13.

118. *Id.*

119. *Id.* at 136.

120. *Id.*

public lawyer may be public information. Furthermore, the accomplishments, as well as the setbacks, of a public lawyer may appear in agency reports or appropriations memoranda available to the public or to the legislature or even possibly on the front page of the newspaper. In order to endure and even thrive in a fishbowl, public lawyers must strive to perfect the lawyerly virtues of *integrity*, *discipline*, and *perseverance* in order to be above reproach and to achieve the myriad of responsibilities they are charged with accomplishing in the public interest.

### B. Multiple Constituencies

While private lawyers are accountable to their partners in a law firm, to their clients and, ultimately, to state disciplinary authorities, public lawyers may have to answer to the legislature (federal, state, or local) in oversight hearings to determine their performance as measured against enabling legislation that created their jobs and agencies. An example of this might be a lawyer working for the Federal Trade Commission on matters of consumer protection. Public lawyers may have to take directions and orders from the chief executive officer charged with administering the law and policy of their agency. Lawyers working for executive branch agencies (e.g., the U.S. Department of Labor or a state's department of commerce) have to respond to memoranda from the President of the United States, governor of the state, or officials in the chain of command, regarding the settling of litigation or the general enforcement of laws. Public lawyers have to report to superiors within their agency, department, or branch regarding the implementation of law and policy; these superiors will usually (at least at the higher levels) be political appointees of the same political party as the chief executive (or an elected official other than the chief executive such as a state attorney general or county prosecutor). Finally, public lawyers must be sensitive to queries and requests from members of the public at large as well as from reporters of various public media.

The problem of multiple constituencies for public lawyers demands special attention and focus on the lawyerly virtues of *balance*, *energy*, and *justice* in order to do what it takes to properly respond to these constituencies without neglecting any stakeholder; but, without unfairly favoring any one stakeholder.

### C. Low Relative Pay

Public lawyers tend to make less—and, in some instances, much less—money than private lawyers. And yet, the cash value of a stint in the public sector (especially as a cabinet or subcabinet official of state or federal government) creates challenges for public lawyers to properly compartmentalize their professional activities—or they may run afoul of the ethical imperatives of impartiality and evenhandedness. Public lawyers cannot favor, or even provide the appearance of favoring, private firms for which they are interested in working after their stints of public service are over. In a related fashion, private lawyers with aspirations toward public lawyer “plum” positions—for example, appointment as a high ranking lawyer in the U.S. Department of Defense or the U.S. Department of Justice—must scrupulously segregate their private lawyerly

interests from the more circumscribed duties of public lawyers.

The revolving door connection between the private sphere and the public sphere calls for special application by public lawyers of lawyerly virtues of *courage* and *idealism* to strive to avoid self-interest and, instead, to pursue the public interest. In my judgment, a lawyer that exemplified the proper entering and exiting of public roles and private roles was the late Elliot Richardson of Massachusetts.<sup>121</sup>

#### *D. Temptations to Grandstand*

Public lawyers can usually succeed in getting the attention of reporters; as a result, if they wish, public lawyers often can see their names in print. Public lawyers must resist the inclination to supply the media with their own opinions about legal and political adversaries. Although some private lawyers are able to get their names in print about specific cases they are handling, public lawyers have greater temptations to grandstand. The lawyerly virtues of *integrity*, *justice*, and *discipline* are crucial for public lawyers to master in order to deal with the strong temptation to vent egos in the media and, possibly, risk unfair advantage.

#### *E. Herculean Expectations*

Public lawyers are expected to do an endless assortment of tasks and to perform multiple functions. By way of example, several years ago I volunteered to help out a candidate running for the office of Indiana Attorney General. The candidate requested that I research and write a memorandum on the duties and responsibilities of Indiana Attorney General. I was amazed to find *hundreds* of statutory provisions charging that public lawyer—as well as the deputy attorney generals who worked with him or her—with responsibilities to investigate and enforce a panoply of laws. Other public lawyers (federal, state, local, or private attorneys bringing citizen suits as private attorneys general or representing charitable organizations) face similar crushing job performance expectations.

How is one to cope? In order to deal with these Herculean expectations, public lawyers must combine the virtues of *compassion* (to help those in need) and *justice* (to right wrongs) with *creativity* and *discipline* to figure out appropriate priorities and to stretch scarce funds and busy work schedules. There will never be enough time to accomplish all that is expected. There will never be sufficient funds to hire staff needed to do the work. Indeed, legislatures tend to increase the workloads and mandates of public lawyer jobs but then fail to appropriate sufficient money to do the work.

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121. See ELLIOT RICHARDSON, REFLECTIONS OF A RADICAL MODERATE 81-104 (1996). Richardson served in multiple jobs as a public lawyer—including United States Attorney, Attorney General of Massachusetts, Lieutenant Governor of Massachusetts, under U.S. Secretary of State, Secretary of the Department of Health, Education, and Welfare, Secretary of Defense, Attorney General of the United States, and Secretary of Commerce—and as a partner in a major private law firm. He wrote an entire chapter of his book on public service. *Id.*

## CONCLUSION

There are several ways to describe what it means to be an American public lawyer. Elected officials who are lawyers and who perform legal roles in office clearly fit the definition of a public lawyer—whether at the national, state, or local levels. Government lawyers—hired by federal, state, or local government agencies or officers—meet the definition of public lawyer, as well. Surprisingly for some, private lawyers can function as public lawyers when they act as private attorneys general, when they represent charitable organizations, and even when they advance public policy-based legal arguments for private clients.

In pondering how public lawyers should go about trying to do their difficult jobs, we might approach the problem in a negative fashion by seeking to describe the principal vices—like sloth, greed, and anger, for instance—that public lawyers should strive to avoid. Nonetheless, a more positive approach of trying to articulate specific characteristics, or virtues, of a good public lawyer is a more appealing and useful strategy.

All American lawyers—no matter if they work for the government, are lawyers in a private law firm, or in-house counsel in a business—need to focus on the ten vital lawyerly virtues in the following order of relative importance: (1) balance, (2) integrity, (3) idealism, (4) compassion, (5) courage, (6) creativity, (7) energy, (8) justice, (9) discipline, and (10) perseverance. Nonetheless, public lawyers face five specific virtuous challenges in performing their jobs. First, public lawyers must adapt to life in a fish bowl. Second, public lawyers face multiple demanding constituencies. Third, public lawyers must cope with receiving lower relative pay for their work. Fourth, public lawyers must control temptations to grandstand. Finally, public lawyers must handle Herculean expectations from others and themselves. In the final analysis, public lawyers need to exercise the synoptical virtue of *wisdom*<sup>122</sup> in addressing specific challenges with appropriate lawyerly virtues.

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122. According to Professor J. Rufus Fears, achieving the virtue of wisdom is a three-step process of moral education:

*Educo*—to lead out from yourself. An education is a three-stage process, and it begins with information. It begins with every day. In fact, we live in a world in which we are so overwhelmed by facts and data that we have barely time to think. The data becomes so overwhelming that it is difficult to take the next step, which is to weave this into knowledge.

What is knowledge? Knowledge is . . . an ability to see the pattern in a particular subject.

But there is a third step, and that is taking that pattern and living your life by it, applying it. And that is what Socrates, and that is what Cicero, and that is what Dante and that is what Goethe all meant by “wisdom.” Wisdom is ultimately an act of mediation.

3 FEARS, *supra* note 1, at 213-14.

# A CHANGING CULTURE: ETHICAL GOVERNMENT IN NORTHWEST INDIANA

EDWARD E. CHARBONNEAU\*

## INTRODUCTION

Public corruption is a plague that infects all that it touches. It not only corrupts those involved, but corrupts the system of government that permits it to survive. It corrupts the area where it exists and taints the view that those outside the area have. It corrupts the public's confidence in their elected officials and causes the public to not participate in the political process with the view that it makes no difference because everyone is corrupt.

For far too long, citizens looked at corrupt government as a way of doing business in Lake County. Tolerance of corrupt public officials resulted in even lower expectations. This image unfortunately tends to become self-fulfilling and makes any effort to change it all the more difficult.

Long characterized as a place where government corruption was the norm rather than the exception, a culture change of epic proportions is taking place in Northwest Indiana. Although the vast majority of public officials in the region are honest and ethical, over the years, everyone gets tainted, and ultimately all pay a heavy price for those who are in public service for personal gain.

As the new millennium arrived, that all began to change in Northwest Indiana as a major "weeding and seeding" effort began to unfold. Public disgust had reached a point where business as usual was no longer acceptable. A series of events, really beginning around 1990 with the creation of the Northwest Indiana Quality of Life Council, served as the impetus for change.<sup>1</sup> By 2003, intense energy was being directed at weeding out corrupt public officials, while seeding the political system with opportunities, encouragement, and support for elected officials to focus attention on transparency and the promotion of ethics in government. The following is intended to be a brief summary of significant stopping points along the road to changing the culture of Northwest Indiana and creating an ethical government once again worthy of the public's trust.

## I. STUDY: *TRANSFORMING THE ECONOMY OF NORTHWEST INDIANA*

In December of 2000, a study, *Transforming the Economy of Northwest Indiana*, was released.<sup>2</sup> Funded by the Northwest Indiana Quality of Life Council, the study was conducted by William Sheldrake, President of the Indiana Fiscal Policy Institute, and Morton Marcus, Director of the Indiana Business Research Center at Indiana University's Kelley School of Business. The study commented on the significant mistrust of and by local political leaders,

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1. See Northwest Indiana Quality of Life Council, *Mission*, <http://www.nwiqlc.org/qlcfacts.php> (last visited May 18, 2006).

2. WILLIAM SHELDRAKE & MORTON MARCUS, *TRANSFORMING THE ECONOMY OF NORTHWEST INDIANA* (2001) (report delivered to the Northwest Indiana Quality of Life Council).

corruption in government, perceptions of the Northwest Indiana region, and the affect of those perceptions on economic development and the quality of life.<sup>3</sup>

Although certainly everyone recognized the credibility gap that had existed long before the release of the study, no one ever talked openly and consistently about it or suggested that the citizens get involved to do something to correct the situation. Finally, the topic had been broached in a published report suggesting that public corruption was affecting the quality of life of the residents of Northwest Indiana. If the region was ever going to once again enjoy a vibrant economy, the issue had to be addressed, and change had to be forthcoming.

## II. UNITED STATES ATTORNEY

On September 21, 2001, Joseph Van Bokkelen was appointed United States Attorney for the Northern District of Indiana.<sup>4</sup> He established as one of the district's priorities the investigation, charging, and prosecution of public corruption.<sup>5</sup> His commitment was to remove those who chose to abuse their oath of office and exploit the public trust.

Since announcing his program, Operation Restore Public Integrity,<sup>6</sup> more than thirty persons have been indicted or otherwise charged. The public has a right to know whether their public officials are honest, and the public officials need to know that someone is watching them. In the words of the U.S. Attorney, "A little paranoia is not bad in this area."<sup>7</sup>

## III. NORTHWEST INDIANA QUALITY OF LIFE COUNCIL

In September of 2002, the Northwest Indiana Local Government Academy was established at Indiana University Northwest.<sup>8</sup> A collaborative effort of the six colleges and universities in Northwest Indiana, the Academy's mission is to promote excellence in both government and governance by providing educational opportunities that will enhance the leadership and decision making skills of local elected officials, public employees, and citizens.<sup>9</sup>

The Northwest Indiana Quality of Life Council is a public/private partnership

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3. *Id.*

4. United States Attorney's Office, Northern District of Indiana, *Joe Van Bokkelen*, [http://www.usdoj.gov/usao/inn/District\\_Info/USAttorney.htm](http://www.usdoj.gov/usao/inn/District_Info/USAttorney.htm) (last visited May 18, 2006).

5. Speaker's Bureau, United States Attorney's Office, Northern District of Indiana, *Mission of the United States Attorney's Office for the Northern District of Indiana*, [http://www.usdoj.gov/usao/inn/Speaker\\_Bureau/Speakers\\_Bureau2.htm](http://www.usdoj.gov/usao/inn/Speaker_Bureau/Speakers_Bureau2.htm) (last visited Apr. 11, 2006).

6. Debra Gruszecki, *Arrests Played out Like an Adagio, While Code of Ethics is Passed*, TIMES (Northwest Indiana), Sept. 6, 2003, available at [http://www.thetimesonline.com/articles/2003/09/06/news/top\\_news/affa3bc0fc12580686256d9900146a59.txt](http://www.thetimesonline.com/articles/2003/09/06/news/top_news/affa3bc0fc12580686256d9900146a59.txt).

7. *Id.* (internal quotation marks omitted).

8. See generally Indiana University Northwest, Northwest Indiana Local Government Academy, <http://www.iun.edu/~lga/> (last visited May 18, 2006) (discussing the organization's history and mission).

9. *Id.*

formed to promote sustainable development in Lake, Porter, and LaPorte Counties.<sup>10</sup> The Quality of Life Council provides a forum for a diverse group of individuals from both the public and private sector to meet on a regular basis to formally promote continuous improvement in the quality of life in Northwest Indiana through the development of an appreciation for regional solutions to the challenges faced in achieving and sustaining a high quality of life, sponsoring needed research to improve the quality of life, identifying and advocating for needed sustainable development projects, and developing and monitoring key indicators pertaining to the region's quality of life.<sup>11</sup>

In June 2003, the Northwest Indiana Quality of Life Council released a draft of its Quality of Life Indicators Report.<sup>12</sup> The report addressed eleven community based "indicators" ranging from diversity to health and safety. At the conclusion of the discussion of each of the indicators was a set of recommendations. It was hoped that the policy recommendations would be used by decision-makers to craft public policy at the local, county, regional, and state levels of government.

One of the indicators, "A Community of Engaged and Caring Citizens"<sup>13</sup> included a discussion of local government in the three-county area.<sup>14</sup> Included in the recommendations at the end of the section was a call for all local units of government to develop and adopt ethics ordinances.<sup>15</sup> The newly-established Local Government Academy was encouraged to serve as a resource for those communities.<sup>16</sup>

#### IV. ETHICS SYMPOSIUM

About the same time as the Indicators Report was being released, the Local Government Academy was asked by the Northwest Indiana Quality of Life Council to develop an ethics symposium for the Council's September meeting.<sup>17</sup>

At the conclusion of the symposium, the Quality of Life Council adopted a resolution supporting the development, adoption, and full implementation of ethics ordinances in all municipalities and county governments in Lake, Porter, and LaPorte Counties.<sup>18</sup> In addition, the resolution recommended a set of minimum standards for inclusion such as the appointment of an ethics officer, training for employees and elected officials, identification of an investigatory

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10. Northwest Indiana Quality of Life Council, *supra* note 1.

11. *Id.*

12. NORTHWEST INDIANA QUALITY OF LIFE COUNCIL, QUALITY OF LIFE INDICATORS REPORT (2004), <http://www.nwiglc.org/indicators/2004QLCIndicatorsReport.pdf>.

13. *See id.* at 91.

14. *Id.* at 93-98.

15. *Id.* at 101.

16. *Id.*

17. Northwest Indiana Quality of Life Council, Quarterly Meeting Agenda (Sept. 5, 2003) (on file with author).

18. QUALITY OF LIFE COUNCIL, RESOLUTION: MUNICIPAL AND COUNTY ETHICS ORDINANCES (2003). The resolution is included as Appendix A.

body to address suspected violations of the ethics code, and substantive sections that address issues such as gifts, conflicts of interest and nepotism, post-employment restrictions, financial disclosure, whistleblower protection, and appropriate enforcement authority.<sup>19</sup>

The Northwest Indiana Quality of Life Council committed to communicate the contents of the resolution to decision-makers in Northwest Indiana; to provide supplemental information and materials to decision-makers who can contribute to the development, adoption, and full implementation of ethics ordinances in all municipalities and county governments in the Lake, Porter, and LaPorte Counties; and to take steps to educate the general public regarding the need to adopt robust ethics ordinances.<sup>20</sup>

One of the speakers at the symposium was the United States Attorney, Joe Van Bokkelen. Van Bokkelen discussed his number one priority: rooting out public corruption. As he spoke about zero tolerance for public corruption, nine people were being arrested by agents of both the FBI and Department of Labor. This action occurred as the result of two federal indictments having been returned the previous day.<sup>21</sup>

In the first, six East Chicago public officials, the city controller, engineer, park superintendent, and three East Chicago City Council members were indicted on eleven counts of fraud. The charges stemmed from an earlier concrete replacement program. Subsequently all six either pled guilty or were convicted by a jury.

The second was a sixteen-count indictment stemming from a real estate development in Chesterton, Indiana. Four people were charged with funneling kickbacks in a 1999 land deal, including a union official and the former Indiana Democrat Party Chairman. All were subsequently found guilty either by way of a plea or, in one case, a trial.

On September 5, 2003, the weeding and seeding efforts picked up considerable momentum and sent shock waves around Northwest Indiana. From that day forward the pace of activities as well as the public's awareness increased exponentially. With the help of the two local newspapers, the *Times* and the *Post Tribune*, the importance of rooting out public corruption, and the need for transparency in government and ethics, subjects rarely if ever mentioned in the past, were now in front of the public on a routine basis.

#### V. ETHICS ORDINANCES AND INDIANA HOUSE BILL 1033

In November 2003, the Town of St. John became the first in a series of communities to pass an ethics ordinance. The example set by the Town of St. John was followed quickly by the City of Hobart, which passed an ordinance of its own in December.<sup>22</sup>

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19. *Id.*

20. *Id.*

21. Gruszecki, *supra* note 6.

22. See *Ethics in Local Government Have Overcome a Serious Issue in NWI*, NORTHWEST INDIANA LOCAL GOVERNMENT ACADEMY, Apr. 4, 2004, [http://www.iun.edu/~lga/news/4\\_5\\_04](http://www.iun.edu/~lga/news/4_5_04)

State Representative Charlie Brown (D-Gary) was a participant at the September 5, 2003, ethics symposium.<sup>23</sup> He took part in a panel discussion on the need for ethics in government.<sup>24</sup> That day he informed the author that he would be drafting legislation for introduction during the next session.

Representative Brown followed up on that commitment by introducing House Bill 1033 in December of 2003 for consideration during the 2004 legislative session.<sup>25</sup> The bill, which incorporated significant parts of the language in the resolution that had been adopted by the Quality of Life Council at its quarterly meeting three months earlier, was referred to the Committee on Local Government. The bill was never given a hearing by the chairman of the committee.

VI. 2004 DEVELOPMENTS

A. *Ethics Ordinances*

The pace and intensity of discussion began to gain momentum as 2004 arrived. In January 2004, three communities, the Town of Highland, the City of Crown Point, and the City of LaPorte, passed Sense of Council Resolutions.<sup>26</sup> In each instance, the resolution was recognition of the importance of having an ethics ordinance, a strong endorsement of the establishment of an ethical public culture in the public service, and support for the ongoing efforts of the Local Government Academy. A month later, in February 2004, the City of Lake Station passed an ethics ordinance.<sup>27</sup>

B. *Ethics Pledges*

In early 2004, the Lake County Community Development Committee (“LCCDC”) became aware of the emphasis being placed on ethical government by the Local Government Academy. Wanting to actively support the effort, the LCCDC came up with the idea of an Ethics Pledge for candidates running for office in the April 2004 primary elections.<sup>28</sup> The pledge was sent to every candidate running in the primary election in Lake County. Candidates were encouraged to review and sign the pledge and return it to a representative of the LCCDC. Out of 114 letters sent, 111 pledges were signed and returned.

The Mayor of Valparaiso requested that the pledge be re-worded so that it would be appropriate for city employees to sign. The LCCDC did so, drafting a second pledge suitable for use by government employees.

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.shtml [hereinafter *Ethics in Local Government*].

23. See app. A.  
24. See app. A.  
25. H.R. 1033, 113th Leg., 2d Reg. Sess. (Ind. 2003).  
26. See *Ethics in Local Government*, *supra* note 22.  
27. See *id.*  
28. LAKE COUNTY COMMUNITY DEVELOPMENT COMMITTEE, ETHICS PLEDGE (2004). The pledge is included as Appendix B.

On March 26, 2004, an ethics workshop was conducted to discuss what had transpired in Northwest Indiana since the September 2003 symposium. It presented an opportunity for the various communities that had adopted an ordinance already to review their experiences with those who were in the discussion and review stages.

### *C. Ethical Campaign Issues*

For the first time in memory, the 2004 election campaign gave rise to Northwest Indiana's first real ethical campaign issue in the Town of Highland. Prior to the election, two policemen were members of the five-member Town Council. With a fireman running for one of the other council seats, Highland faced the distinct possibility of having a town council controlled by town employees.

The conflict of interest issue was hotly debated and well documented by the local media during the campaign. It should be noted that a subsequent review of the prior four years of activity revealed that the two town employees who were already sitting on the council voted more than three hundred times on issues likely to be considered conflicts such as salaries, claims, work rules, and take home cars.

In the end, all three town employees were defeated in the 2004 election. It will never be known if the ethical issue played any role in the outcome of the election. Nevertheless, it is significant in the author's mind that the issue was raised and discussed as ardently as it was during the campaign.

### *D. Additional Ethics Ordinances*

In June 2004, the City of LaPorte adopted an ethics ordinance and followed up by appointing an ethics officer for the city.<sup>29</sup> During the month of July 2004, the Town of Merrillville passed its version of a "Sense of Council" resolution similar in nature to the ones which had been passed in Crown Point, Highland, and LaPorte. Merrillville also appointed an ethics officer for the town. In September, the Town of Cedar Lake, and then in December, the City of Whiting adopted ethics ordinances for their respective communities.<sup>30</sup> As had been done earlier in LaPorte and Merrillville, both communities appointed an ethics officer for their respective community.

### *E. Land Use Planning Workshop*

In December 2004, at its Quarterly Meeting, the Quality of Life Council conducted a workshop on the issue of Land Use Planning.<sup>31</sup> Part of the workshop was a role-playing session of a local town/city council meeting. The issue being

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29. LaPorte, Ind., Ordinance 16-2004 (June 2004).

30. Cedar Lake, Ind., Ordinance 896 (Sept. 2004); Whiting, Ind., Ordinance CC-2004-1696 (Dec. 2004).

31. Northwest Indiana Quality of Life Council, Sensible Tools for Healthy Communities Workshop (Dec. 3, 2004) (on file with author).

discussed by the council was a big development being planned and the need for a variance. As the meeting began, the first question raised by participants was one addressing an ethical issue involving the appropriateness of a large developer “winning and dining” council members before they were going to vote on the developer’s request for a variance.

This event is mentioned because, two or three years earlier, the ethical issue would never have been mentioned, much less be the first topic raised as a point of discussion. The community of Northwest Indiana was becoming sensitized to the important role ethical government plays in economic development, capital investment, job creation, and quality of life for its citizens.

#### *F. Indiana House Bill 1360*

In December 2004, State Representative Charlie Brown (D-Gary) once again introduced legislation, House Bill 1360, dealing with the establishment of ethics ordinances in all cities and towns in the state.<sup>32</sup> The language of that bill was identical to that of House Bill 1033, which Representative Brown had introduced a year earlier. This time, however, Representative Brown had a co-sponsor on the bill, Phil Hinkle (R-Indianapolis), Chairman of the Committee on Local Government.

The bill, as was the case a year earlier, was referred to the Committee on Local Government. Unlike the prior year, however, the bill was given a hearing in committee on February 10, 2005. Representatives from the Indiana Association of Cities and Towns, the Indiana Association of Counties, and the County Commissioners Organization all testified against the legislation. It did not pass out of committee.

### VII. 2005 DEVELOPMENTS

#### *A. Ethics Ordinances*

On March 17, 2005, the City of Valparaiso Ethics Commission completed an extensive update of Valparaiso’s ethics ordinance.<sup>33</sup> The original ordinance was drafted and adopted in 1994. As quickly as it had been passed, it was placed on a shelf and ignored until the effort to reinvigorate the Ethics Commission and ethics policy by Mayor Costas. Almost a year later, the revised ordinance has still not been acted upon by the Valparaiso City Council.

In April, Porter Township in Porter County adopted an ethics policy. In October, Porter County adopted an Ethics Policy.<sup>34</sup> That same month, four organizations came together to draft a document called a *Compact with Lake County Voters*.<sup>35</sup> Similar in some respects to the ethics pledge a year earlier, the

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32. H.R. 1360, 113th Leg., 2d Reg. Sess. (Ind. 2004).

33. Valparaiso, Ind., Ordinance 37-2005 (Mar. 17, 2005).

34. A Resolution Adopting an Ethics Policy for Representatives of Porter Township, Porter Township Res. 2005-2 (Apr. 6, 2005).

35. NORTHWEST INDIANA QUALITY OF LIFE COUNCIL ET AL., COMPACT WITH VOTERS OF LAKE

compact dealt with values such as transparency, efficiency and effectiveness, accountability, and citizen involvement at the county level of government.<sup>36</sup> Candidates running for county-wide office in the 2006 primary election were asked to sign the compact. A majority of the fifty-four candidates opted to sign the compact.

As 2005 was coming to an end, another noteworthy event took place in Northwest Indiana the evening of November 21, 2005. That night in Schererville, Indiana, the Crown Point City Council and the Town Councils from Highland and Munster met in joint session. During that session, each of the three communities adopted identical language ethics ordinances.<sup>37</sup> Additionally, the three communities adopted a unique Inter-local Agreement which dealt with two issues: first, joint ethics training, and second, the creation of a three-community Shared Ethics Advisory Commission.

### *B. Indiana House Bill 1120 and the Northwest Indiana Regional Development Authority*

During the 2005 legislative session, House Bill 1120<sup>38</sup> was passed.<sup>39</sup> Among other things, the bill established the Northwest Indiana Regional Development Authority ("RDA"). The bill was an extraordinary convergence of vision and politics in Indiana. Signed into law by Governor Daniels on May 11, 2005, at the Gary/Chicago Airport, the Regional Development Authority was considered a critical step toward reviving the economy of the region by providing a major funding source for large economic development projects in Lake and Porter Counties.

The first public meeting of the RDA revealed yet again how the culture in Northwest Indiana was changing. At that first meeting on September 26, 2005, the chairman of the Regional Development Authority invited the author of this Article, as Executive Director of the Northwest Indiana Local Government Academy, to make a presentation on the important role the Regional Development Authority could play in advancing the cause of transparency and ethics in government.<sup>40</sup>

The following day, at its first formal meeting, the seven newly appointed members of the RDA spent considerable time discussing the momentous opportunity that was at hand for the RDA to lead by example and to set the tone

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COUNTY (2005). This is included as Appendix C.

36. *Id.*

37. Town of Munster, Minutes of a Special Meeting of the Town Council Conducted Jointly with the Common Council of the City of Crown Point and the Town Council of the Town of Highland (Nov. 21, 2005), available at [http://www.munster.org/egov/docs/1143554513\\_797851.pdf](http://www.munster.org/egov/docs/1143554513_797851.pdf).

38. H.R. 1120, 114th Leg., 1st Reg. Sess. (Ind. 2005).

39. *Governor Signs Stadium Bill*, INDIANAPOLIS STAR, May 11, 2005, available at <http://www.indystar.com/apps/pbcs.dll/article?AID=/20050511/NEWS01/50511009/1006>.

40. Northwest Indiana Regional Development Authority, Organizational RDA Board Meeting Agenda (Sept. 26, 2005) (on file with author).

for future behavior on the part of local units of government. A long discussion ensued surrounding the establishment of a set of values and a vision for the RDA along with an ethics policy.<sup>41</sup>

Talk turned to action at the October meeting of the RDA when the Board ratified its values and vision.<sup>42</sup> The values—to be bold, collaborative, transparent, non-partisan, efficient, and accountable—are intended to be the guiding compass as the authority conducts its business. At the same meeting, the RDA ratified a substantive ethics policy for its board and its employees. A subcommittee reviewed many sample ethics ordinances and policies before coming up with its own. The policy adopted somewhat mirrors the state ethics policy because the state ethics policy was deemed to be the best policy among the ones reviewed.

Taking its role as a catalyst for change earnestly, the RDA went a step further in its efforts to promote transparency in government and ethical behavior as it developed an application form for those entities coming to the Authority seeking financial support. Any organization seeking funding from the RDA will be required to submit as part of its supporting documentation a copy of the ethics guidelines to which the applicant adheres.

#### CONCLUSION

To date, many cities, towns, and other governmental units in Northwest Indiana have recognized the importance of ethical government to the quality of life, capital investment, and job creation in the region. They have taken that belief and acted on it by adopting ethics ordinances or ethics policies. Many others have come to realize it is in their best interests to get involved and become part of the solution, while others steadfastly refuse to adopt the concept of ethics in government.

The weeding has started and will continue, but if simply prosecuting and locking up those public officials who abuse the public trust was the answer, Lake County and Northwest Indiana would long ago have become a corruption-free zone. This obviously is not the sole answer.

Significant culture changing activity—the seeding—has occurred over the past two to three years. In the author's opinion, there is more being done in Northwest Indiana on a regional basis to promote a climate of renewed confidence in public officials than anywhere else in the country. Just a few short years ago, none of this would even have been considered. The citizens are standing up and becoming the good gardeners.

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41. Northwest Indiana, Regional Development Authority Formal Meeting Agenda (Sept. 27, 2005) (on file with author).

42. Vicki Urbanik, *Sanders and Hollenbeck Picked for RDA Director and Attorney Posts*, CHESTERTON TRIB. (Chesterton, Ind.), Oct. 26, 2005, available at [http://www.chestertontribune.com/Northwest%20Indiana/sanders\\_and\\_hollenbeck\\_picked\\_fo.htm](http://www.chestertontribune.com/Northwest%20Indiana/sanders_and_hollenbeck_picked_fo.htm).

## Appendix A



IUN-SPEA

3400 Broadway

Gary, Indiana 46408

# Quality of Life Council

*Creating a Sustainable Future for Northwest Indiana*

(219) 981-5629 Fax: (219) 980-6737

## RESOLUTION

### Municipal and County Ethics Ordinances

**Whereas** the Northwest Indiana Quality of Life Council seeks to promote a higher quality of life in Lake, Porter, and LaPorte Counties;

**Whereas** county and municipal governments play key roles in developing and maintaining a high quality of life that is sustainable over the long term;

**Whereas** confidence in the integrity of governmental officials, both elected and appointed, is critical to citizen engagement in the full life of the community;

**Whereas** confidence in the integrity of local government is shaken by reported and suspected incidences of waste, fraud, and mismanagement;

**Whereas** ethics ordinances have proven effective as:

- Guidelines for elected and appointed officials in the exercise of their public duties,
- Benchmarks against which the behavior of local officials can be assessed, and
- Tool through which to restore and increase public confidence in the integrity of local governments, and

**Whereas** effective ethics ordinances includes certain identifiable elements,

**Now, therefore, be it resolved** that the Northwest Indiana Quality of Life Council supports the development, adoption, and full implementation of ethics ordinances in all municipalities and county governments in Lake, Porter, and LaPorte Counties. At a minimum, these ordinances should include the following elements:

- An “aspirational” introduction that clearly states that the purpose of the code is not to create more criminal codes, but to establish systems that hold the potential to restore trust in local government,
- The appointment of an “ethics officer,” in most instances as a collateral duty of an appointee who is already in service to the municipality or county adopting the

ordinance,

- Required training in ethics for all employees and elected officials,
- The identification of an investigatory body (e.g., an auditor, inspector general, prosecutor, or ethics commission) to address suspected violations of the ethics code, and
- Substantive sections that address the following issues: (1) gifts (i.e., solicitation, acceptance, and unauthorized compensation), (2) employment and business conducted with government entities (i.e., conflicts of interest, lobbying, the hiring of relatives, and patronage), (3) the misuse of public positions, (4) post and pre-employment restrictions, (5) voting conflicts, (6) financial disclosure, (7) sunshine laws and open meetings stipulations, (8) access to public records, (9) procurement, (10) whistleblower protection, (11) campaign ethics, (12) the regulation of private citizens with respect to gifts and bribes, and (13) sanctions pertaining to all of the above, including fines, penalties, removal from office, and public reprimands.

***Pursuant*** to this resolution, the Northwest Indiana Quality of Life Council will:

- Communicate the contents of this resolution to decision-makers in Northwest Indiana;
- Provide supplemental information and materials to decision-makers who can contribute to the development, adoption, and full implementation of ethics ordinances in all municipalities and county governments in the Lake, Porter, and LaPorte Counties; and
- Take steps to educate the general public regarding the need to adopt robust ethics ordinances.

Adopted: ***September 5, 2003***

## **Appendix B**

### **Ethics Pledge**

As a candidate for public office in Lake or Porter Counties, Indiana, I recognize the importance of ethics for my own good and well-being and also for the good and well-being of my constituents and the community as a whole. Therefore, as a candidate and if elected, I pledge to abide by the following Code of Ethics:

1. I will uphold the Constitutions, laws, and regulations of the United States of America and the State of Indiana and its subdivisions as I am required to do by my oath of office. In addition, if I become an elected representative of the people, I will adhere to the fundamental principles of representative democracy.
2. I will adhere to the highest level of ethical conduct and place ethics above party loyalty or personal interests and relationships.
3. I will devote the appropriate amount of time to my office, considering whether it is a full-time or part-time position, and in either case will perform my duties based on fundamental values such as competency, equity, truth, and integrity. In the pursuit of these principles, I will work cooperatively with other public officials.
4. I will use my authority to promote the efficient and effective delivery of public services in my realm of responsibility and will avoid participating in any decision where I have a conflict of interest or from which I, my family, or business associates may personally benefit. Where my public responsibilities require my participation, I will publicly disclose the nature of my conflict.
5. I will never discriminate unfairly by dispensing special favors or privileges to anyone, whether or not for remuneration, and I will never solicit or accept for myself, my family, or my business and professional associates any favor or benefit that might be construed by reasonable persons as influencing the performance of my public duties.
6. I will make no private promises of any kind which may unduly influence my public duties.
7. I will not engage in any business with public agencies that would be—directly or indirectly—inconsistent with the conscientious performance of my public duties and I will make no improper use of public property or resources for the personal benefit of myself, my family, or my business and professional associates.
8. I will never use information coming to me confidentially in the performance of my duties as a means for personal profit or other personal advantage.
9. I accept the responsibility to expose corrupt practices whenever they come to my attention and will, where empowered to do so, protect from retaliation any public employee who has exposed corrupt practices.

10. I solemnly pledge to uphold these principles, ever mindful that public office is a public trust.

I willingly acknowledge my belief in and commitment to this Ethics Pledge and if elected, I further agree to require all employees over whom I have supervision to adhere to this Pledge. All this I commit to this \_\_\_\_ day of \_\_\_\_\_, 2004.

\_\_\_\_\_  
(Signature)

## Appendix C

### Open Letter to the Citizens of Lake County

Dear Citizens:

A great deal has been accomplished over the course of the last five years with respect to local government. Property tax reform has focused renewed attention on its true costs. Our U.S. Attorney has vigorously prosecuted numerous instances of public corruption. Our local newspapers have cast a watchful eye on elected and appointed officials. Studies conducted by Indiana University and others have shed new light on public budgets. The Lake County Community Development Committee and the Local Government Academy of Northwest Indiana have promoted the use of ethics pledges and ethics ordinances. The General Assembly has given us new vehicles (e.g., a Regional Development Authority and an expanded scope of responsibilities for the Northwestern Indiana Regional Planning Council) through which to promote an improved quality of life. And we are encouraged by the participation of officeholders in Lake County Government in Congressman Pete Visclosky's much-welcomed initiative on governmental efficiency and effectiveness.

That being said, Lake County voters are frustrated and angry. Some have called for a wholesale change. Others have thrown up their hands, declaring that nothing will ever change in Lake County.

In our view, both of these responses are unwise. Many elected officials serve us effectively and responsibly. And many citizens who volunteer on boards and commissions or who are employed in local government serve honorably as well. Further, we do not believe that any one political party has a corner on the market of good ideas and ethical performance.

At the same time, we're concerned that the several developments noted above have yet to produce real change in the underlying culture of county government. Too often, decisions appear to revolve around an apparent need to control jobs and other benefits. We worry about a return to business as usual, followed, in another few years, by another spasm of reform.

Elections to county-wide office will soon be upon us. With this in mind, we offer the enclosed "Compact with Lake County Voters" to those who may be considering a run for office and to all Lake County voters. The Compact's provisions reflect values (i.e., transparency, efficiency and effectiveness, accountability, and citizen involvement) and, in some instances, specific remedies associated with the Progressive Era, a nearly century old reform agenda that was largely ignored in Indiana. Together, the Compact's several elements represent a reform agenda that could – we think – contribute to the kind of culture change that is still needed in Lake County government.

We invite all residents of Lake County to consider whether or not candidates for County office in the Spring 2006 primary election demonstrate a willingness to sign on to the Compact. We encourage voters to give strong consideration to candidates who endorse the several commitments reflected in the Compact. Further, we encourage our local newspapers to endorse all or portions of this document and to identify candidates who sign on.

Candidates for County office are encouraged to forward signed copies of the Compact to the attention of Ed Charbonneau, Northwest Indiana Local Government Academy, c/o Indiana University Northwest, 3400 Broadway, Gary, IN 46408. Mr. Charbonneau's fax number is 981-4244.

Together, let's finish the good work that has been accomplished over the course of the last five years!

Sincerely,

\_\_\_\_\_  
Daniel Lowery, Ph.D.  
Northwest Indiana  
Quality of Life Council

\_\_\_\_\_  
Ed Charbonneau  
Northwest Indiana  
Local Government Academy

\_\_\_\_\_  
Phyllis Sovola  
League of Women Voters,  
Calumet Area

\_\_\_\_\_  
Cal Bellamy  
Ethics in Government Taskforce, Lake County  
Community Development Committee

### Compact with Voters of Lake County

As a candidate for county office, I pledge that I will actively support and promote:

1. Full participation in the "Good Government Initiative."

This should include the prompt implementation of any recommendations which fall under the jurisdiction of the office holder. If an office holder determines that a particular recommendation cannot or should not be implemented, a clear explanation as to why should be made public.

2. Development, adoption, and implementation of ordinances and policies and procedures that will better ensure that supplies and equipment paid for by taxpayers (e.g., automobiles, cell phones, etc.) are used exclusively for public purposes.
3. Adoption and enforcement of a robust ethics ordinance and complementary administrative guidelines.

At a minimum, the policies and procedures adopted should address conflicts of interests, gifts, the use of public property, and the appointment of an independent ethics commission.

4. Development of additional analytic/investigative capacity to assist county commissioners and members of the County Council in improving efficiency and effectiveness.

This need could be met by an independent appointee with auditing or other relevant experience. Alternately, a county inspector general could be empowered with limited authority to address concerns pertaining to budgetary and operational performance.

5. Adoption of merit principles in hiring and promotion decisions.

A complementary commitment to equal employment opportunity principles will ensure a highly qualified workforce that is representative of all communities in Lake County. This commitment will require the engagement of a human resources management professional and budgetary incentives to ensure compliance across all departments.

6. Use of professional information technology services.

An explicit goal to unify and centralize the County's data processing functions should be pursued as well.

7. Development of a user-friendly website that provides citizens with current and historical budgetary and operational data pertaining both to efficiency and effectiveness.

8. Adoption of innovative budgeting techniques, such as activity-based accounting.

9. Adoption of those elements of the county manager form of government that are consistent with the State's Constitution.

10. Creation of a volunteer Public Service Commission.

The new commission should be directed to (a) develop "job descriptions" for all appointed boards and commissions, (b) develop a user-friendly web site to facilitate volunteerism, (c) screen applicants for board/commission service, (d) rank the top three-to-five candidates for selection by the appointing authority, (e) promote public service throughout the County, (f) promote participation in under-represented communities, and (g) gather, maintain, and publicize data related to public service in Lake County.

Further, I attest to my willingness to be held accountable for my performance as an elected official in advancing each of these commitments.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Printed Name

# LEGISLATIVE ETHICS IN INDIANA: A MATTER OF PERCEPTION—AND PERCEPTION MATTERS

EDWARD D. FEIGENBAUM\*

Few things are as critical to the effective and efficient performance of a democracy as the understanding by public officials that public service is a public trust. The system can only function properly if those responsible for legislating, implementing, and adjudicating our laws are motivated by public service, rather than by self-interest.<sup>1</sup>

In a state such as Indiana, where service in the General Assembly is a part-time responsibility, this altruistic motivation becomes even more important as lawmakers must insulate—or separate—themselves from assorted outside influences that might adversely affect their ability to make impartial decisions and vote on matters without having their motives questioned over the perception or reality of those actions.

When one considers “Models and Directions for Indiana” in the realm of legislative ethics, there are two approaches to take. One is to consider Indiana legislative ethics in a national context, measuring our progress and standing against Congress or other states across the country. The other option is to evaluate Indiana legislative ethics in a vacuum, and consider whether we can simply do a better job of ensuring that our legislators are responsive to their constituents and the needs of the state, and not swayed by other considerations—illegal or morally questionable—that can be interposed in the relationship between a legislator and his or her district.

When one views the extensive litany of public corruption cases in other states and the daily news reports from other states about questionable ethical activities,<sup>2</sup> Indiana’s legislature appears to be largely above the fray in terms of legislative activities, and has been relatively free of high-profile scandals—admittedly as measured against some significant transgressions in other states—for many years. Indiana appears to be headed in the right direction.

Certainly, the ethical climate is better today than it was in the late 1970s. At that time, two successive Republican Senate president pro tempores were convicted of public corruption charges, the legislature operated in a closed environment accessible only to veteran lobbyists, with control centralized in a handful of members and committees, and a citizen outside of Indianapolis proper had little ability to access news or information about legislative activities.<sup>3</sup> In Indiana, legislative ethics had long resembled the line from *Huckleberry Finn*, where one of the Twain characters asked: “[W]hat’s the use you learning to do right when it’s troublesome to do right and ain’t no trouble to do wrong, and the

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\* B.A., with honors, 1978, Indiana University; M.B.A., 1982, Indiana University School of Business; J.D., 1982, Indiana University School of Law.

1. Edward D. Feigenbaum & Stephan W. Stover, *Privacy and Government Ethics*, in *PRIVACY LAW AND PRACTICE* 16-1 (George B. Trubow ed., 1987).

2. DAVID E. FREEL, *COGEL BLUE BOOK 2005 ETHICS UPDATE* (2005).

3. See JUSTIN E. WALSH, *THE CENTENNIAL HISTORY OF THE INDIANA GENERAL ASSEMBLY, 1816-1978*, at 643-45 (1987).

wages is just the same?”<sup>4</sup>

Why is it better in Indiana today? We seem to benefit from a better class of people in public service for the right reasons. We have more stringent statutory laws and chamber rules proscribing unethical conduct on the part of both lawmakers and those seeking to influence them.<sup>5</sup> Citizens—and prosecutors—have additional tools at their disposal, such as personal financial disclosure forms,<sup>6</sup> to help evaluate whether lawmakers are acting in their own self-interest. We scrutinize conduct more carefully, both as a law enforcement priority and because members of the news media are less dependent on personal relationships with lawmakers and more aggressive in their work.<sup>7</sup> We are home to a generation of Hoosier citizens who appear to have a much lower public tolerance of misconduct than their parents and grandparents. We afford legislators more tools for assessing their own conduct, including a more active Senate ethics committee that provides counsel to colleagues about conflicts (albeit privately, with no public disclosure of the actions), and the Internet, which allows lawmakers to quickly—and anonymously—determine how their colleagues in other states have approached similar situations. Finally, we enjoy greater transparency, through the Internet availability of almost real-time information about legislation and legislative action, and streaming video of legislative floor proceedings and some key committee meetings.

But despite these advances, Indiana is far from perfect for several reasons. First, promoting legislative ethics is a thankless task. Although the public professes to desire high standards, it has low expectations of lawmakers as a group. Put another way, although legislative bodies perennially rank low in public opinion polls—in Indiana and elsewhere—Hoosiers only infrequently speak ill of their own legislators and turn them out of office at a rate that some once joked trailed only that of turnover in the old Soviet Politburo.

Lawmakers also believe that they are largely honest and abide by high standards, and typically take umbrage when their individual respective or collective ethics are questioned.<sup>8</sup> Some even will explain that they are supposed to represent a cross-section of their constituents, and no one claims to hail from a district comprised of Hoosiers whose ethical value systems are above reproach, or represent a district bereft of criminals.

However, public and legislative perceptions of what is appropriate do not appear to be consonant. One veteran Indiana political reporter once wrote that

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4. MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* 94 (Penguin Books ed. 1999).

5. See IND. CODE §§ 2-7 (2005).

6. IND. CODE § 2-2.1-3-2 (2005).

7. *Ethics: Senate Bans Lobbyist-Funded Trips*, 2006 LEGISLATIVE UPDATE (Indiana State Senator Luke Kenley Post-Session Newsletter, Indianapolis, Ind.), Apr. 2006, at 2, available at <http://www.in.gov/S20/2006postsession.pdf>.

8. See Indiana Lobby Registration Commission, COMMENTARY OF THE INDIANA LOBBY REGISTRATION COMMISSION 5 (2001), available at <http://www.in.gov/ilrc/pdf/commentary2001.pdf> (describing “the quickest override action in state history to that date” by legislators of a gubernatorial veto of a bill weakening lobbying reporting standards related to legislators).

the then-chair of the House Ethics Committee spoke at a panel discussion on legislative ethics where “he bemoaned not the legislators who give them all a black eye but the public perception that they deserve that shiner.”<sup>9</sup> Lawmakers often seem to live in an atmosphere of denial and largely seem to believe that they spend long hours at their public business and that their ethics are above reproach.<sup>10</sup> One also, however, hears from entities monitoring their activities that many lawmakers seem to have a sense of entitlement, and that having a lobbyist pick up a tab for a lunch or offer a ticket to an athletic event has no meaning to them.

Legislators often protest that their votes cannot be bought for a “\$10 dinner” or a ticket to an Indiana Pacers basketball game. However, \$10 does not generally even cover the cost of a business lunch in downtown Indianapolis these days, and expensive dinners paid for by lobbyists are more the norm than the exception during legislative sessions. Tickets to sporting events and concerts are far more expensive than they were a decade ago, and many lobbying organizations are able to offer premier seating at courtside, on the fifty-yard line, or in luxurious suites with full food and beverage service. Few Hoosiers have access to such premium tickets—particularly for events such as playoff games or the top concerts—and even then, the price would be daunting for the average Hoosier.

Perhaps more important than the actual meal, hospitality, or gift is the relationship that is built between lobbyists and lawmakers over the course of such events—or on the golf course. Further, Indiana does not bar a lobbyist from serving as a campaign treasurer for a legislative candidate, or from raising money for them, one of the considerations that helped to catapult lobbying reform to a critical mass at the congressional level in early 2006.<sup>11</sup>

Not only does the ability to provide such favors afford a lobbyist access to legislators that few individual Hoosiers can aspire to—despite lawmaker protestations—but relationships are built over the course of such social events that make it far easier for a lawmaker to “help out a friend” and not “just say no” in the context of many legislative actions where the lawmaker’s constituency would not be directly affected, or his or her philosophy would not be invoked.

Ethics issues in Indiana also do not tend to arise as frequently during a legislative session as they do during an election campaign, reducing their salience at a time when solons might be spurred into action to remedy a real or perceived problem. Despite what many elected officials suggest about the ballot box being the appropriate place to resolve most ethical transgressions, the election campaign and ballot box generally are not the best places to address systematic and institutional issues—absent, as we shall see, other changes. However, the

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9. Mary Beth Schneider, *Panel Discussing State Lawmaking Proves Clueless on Ethics Issues*, INDIANAPOLIS STAR, Dec. 8, 1996, at D1.

10. See Mary Dieter, *Political Corruption “Can Happen Anywhere,” Expert Says—Even Here*, LOUISVILLE COURIER-J., Apr. 12, 1992, at B1.

11. See Dana Milbank, *For Would-Be Lobbying Reformers, Money Habit Is Hard to Kick*, WASH. POST, Jan. 26, 2006, at A6.

most readily available alternative to the ballot box—short of seeking an indictment of a lawmaker—is the recourse available through the respective statutory ethics committees in the House and Senate.<sup>12</sup>

One would be hard-pressed to recall the last time that the Senate Ethics Committee sanctioned a lawmaker for inappropriate public conduct of a non-sexual nature. The House Ethics Committee was largely dormant until called upon to rule on two unrelated matters in 1997. At that time, the panel issued reprimands to two lawmakers for their respective transgressions (which ultimately boiled down to full disclosure of certain relationships on personal financial disclosure forms); one legislator was from such a safe district that it was of no practical impact, and the other was ultimately indicted for conduct that was part of the same issue.<sup>13</sup>

The latter incident was particularly intriguing for the light that it shed on just how difficult it is for one lawmaker to sit in judgment of a colleague—particularly one whom the House Ethics Committee Chair described as “not just a friend of mine; he is one of my very best friends.”<sup>14</sup> Although some might suggest that the chair voting to reprimand his friend and colleague indicates that the process works, the panel reduced the charges to the least severe option, and the sanction was not particularly meaningful (the whole House never had the opportunity to ratify the action because the hearing took place after that year’s legislative session was completed, and the lawmaker in question did not seek re-election).

Importantly, neither the chair nor any of the House Ethics Committee members chose to recuse themselves from the proceedings, which one would assume a judge would do in a similar situation involving a “best friend” or colleague. Of course, there is no alternative in legislative rules for someone to substitute for a member of the body on an ethics panel. As the Senate Ethics Committee Chair acknowledged that same year, “I’m somewhat protective of my fellow senators.”<sup>15</sup>

As the *Indianapolis Star* recognized in its far-reaching “Statehouse Sellout” series a decade ago, “Lawmakers police themselves. They handpick the commission that oversees lobbyists. And they sit on their own ethics committees, which rarely meet.”<sup>16</sup>

What may be the overarching circumstance, however, is the

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12. IND. CODE § 2-2.1-3-5 (2005).

13. *Wurster v. State*, 715 N.E.2d 341, 350 (Ind. 1999) (ruling that so-called “retainer bribery” was not technically a crime under Indiana law and throwing out the indictment).

14. Jeffrey M. Linder, *Friend’s Political Death Time of Pain, Mourning*, SHELBYVILLE NEWS, Jan. 14, 1997, at Opinion Page. “To be very honest, I felt horrible about having to make that decision, and at times I felt like I was deserting one of my best friends,” wrote the chair, who added that “[h]e is honorable, and despite the fact that I led the committee that voted to reprimand him, I would trust him with anything and everything I have.” *Id.*

15. Linda Graham Caleca & Janet E. Williams, *Statehouse Sellout: Conflicting Loyalties*, INDIANAPOLIS STAR, Feb. 12, 1996, at A1.

16. *Id.*; see *Common Cause, Inc. v. State*, 691 N.E.2d 1358, 1362 (Ind. Ct. App. 1998).

misunderstanding that many lawmakers seem to have about ethics laws. They are not always to be wielded as a weapon by a prosecutor or the opposite political party, but they can be an incentive as well. For example, a study by the Connecticut Center for Economic Analysis at the University of Connecticut concludes that honest government may be more important than a favorable tax environment in sustaining strong economic performance.<sup>17</sup> Additionally, a positive stance on ethics by a lawmaker may also give him or her a political edge and offer a bright line by which a lawmaker can clearly avoid transgressions.

What is needed in Indiana—to benefit both legislators and all Hoosiers—is a new legislative ethics code. Before drafting an appropriate legislative ethics code, however, lawmakers and their constituents need to take a step back and make several assessments and value judgments. Those involved in the process of devising a new code must decide whether to address actual problems or the perception of problems. Legislators might automatically assume that only real problems need to be remedied, but they may also benefit from addressing issues of perception, so that their motives are not questioned at every juncture. Indeed, perception can be critical, because even absent actual problems, public confidence in the system may negatively impact individual lawmakers and the public's collective assessment of the legislative process.

Perception of legislative ethics can take many different forms. Indiana reformed its lobbying law in the early 1990s—largely as a legislative response to what it perceived as overly broad interpretations of the existing law by two statewide officials with their eyes on other statewide offices. When lawmakers enacted the law, they removed lobby regulation from the Secretary of State's office and created a new "Legislative Ethics Commission," which quickly recommended to the General Assembly that it be renamed the "Indiana Lobbying Commission," rejecting a suggestion from Common Cause to recommend to the legislature a change to the "Indiana Lobbying Enforcement Commission." In the end, the House bill recommending the name change to the "Indiana Lobbying Commission" was amended in the Senate Ethics Committee to the "Indiana Lobby Registration Commission."<sup>18</sup>

The initial evaluation must consider what is trying to be achieved and then proceed from there. Are the drafters concerned about too much money skewing the legislative process or with the impact of campaign contributions by wealthy individuals or key interest groups? Is government secrecy the evil? Is government accountability critical? Are friends and family wielding too much influence? Are public officials and employees benefitting from public service? Should we recognize the unique conflict dilemmas fostered by our desire for a part-time legislature? Is legislator coziness with lobbyists an issue, either through personal or campaign relationships? Are conflicts of interest the concern? Are gifts to legislators problematic? Should legislators be employed

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17. Steven P. Lanza, *The Economics of Ethics: The Cost of Political Corruption*, 12 THE CONNECTICUT ECONOMY 4, 4-5 (2004).

18. EDWARD D. FEIGENBAUM, INDIANA LOBBYING LAW COMPLIANCE MANUAL 1997 (2d ed. 1997); see IND. CODE § 2-7-1.6-1 (2005).

by public entities? Does there need to be a restriction on the nature, type, and timing of post-government employment? Is the enforcement process appropriate to address the problems? Are penalties for misconduct a sufficient deterrent?<sup>19</sup>

Problems usually are addressed first through increased disclosure (e.g., more details on personal financial disclosure forms and campaign finance reports) and transparency (e.g., public votes, open meetings and sessions, votes on discrete items rather than on unwieldy omnibus measures—and earmarking of appropriations items). This openness can help deter deceit through publicity and forces officials to consider the full implications of any potentially unethical actions. Codes of conduct (that may be either aspirational or offer detailed litanies of appropriate activity) may be appropriate tools. However, proscription of certain types of conduct—definitive standards by which the public and prosecutors can evaluate actions—and active enforcement with meaningful penalties may be necessary to assure the public.

Yet talk of regulating conduct jumps the gun. Drafters must first assess where the state currently stands, decide where they want to go, and *then* fill in the blanks with statutory language that may be prohibitory, may increase transparency, or offer a combination of the two.

Indeed, the initial assessment of the current state of the state with respect to legislative ethics may simply suggest that common practice in certain areas—without respect to the laws or enforcement—is reasonable. The assessment might find that the laws in place today are sufficient as written, if a different emphasis is placed on enforcing them. We may come to the conclusion that leaving legislative ethics to the laws of nature, allowing voters to take care of the wayward, is working—or that it might work better with greater information made available to voters or with a more competitive electoral system, either in terms of party competition, changed campaign finance laws, or a different system for legislative redistricting.

Those looking at revising the law are best-advised to do it comprehensively and with an understanding of the special context within which ethics laws originate and operate. Unfortunately, ethics laws tend to be reactive in nature.<sup>20</sup> They are often drafted “[i]n the white heat of public disgust with the breakdown” as a specific response to one problem as lawmakers rush to fix something that has raised their hackles, or placed them in the cross-hairs of the electorate.<sup>21</sup> Such a “quick fix” reduces the capacity for moral reflection and deliberation. In a more practical sense, piecemeal change also results in inconsistency, both in the application of the laws and in their understanding by both officials and the

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19. Robert W. Smith, *A Comparison of the Ethics Infrastructure in China and the United States*, 6 PUB. INTEGRITY 299 (2004) (focusing on a recent comparison of ethics in the United States and China and containing the amusing query, “Should Public Servants Be Executed for Breaches of Ethics—or Is a \$150 Fine Enough?”).

20. See, e.g., Allen Greenblatt, *Altered State*, GOVERNING 15-16 (Feb. 2006); Dieter, *supra* note 10.

21. Earl S. Mackey, *Dismantling the Kentucky Legislative Ethics Law*, 5 PUB. INTEGRITY 149, 150 (2003).

public. Furthermore, like patching the proverbial bicycle tire, a change in one area may simply create unanticipated—or undue—pressure in another.

What many also tend to overlook is that ethics concepts are often elusive, as well. They are very difficult to draft with the right specificity and even borrowing components from other states or from national model laws may not be sufficient because of the piecemeal nature.<sup>22</sup>

Lawmakers are often reluctant to be too comprehensive or demanding when the laws they draft apply to them, and Indiana's ethics rules for legislators<sup>23</sup> are briefer and less proscriptive than the code of ethics that Indiana's lobbyists have drafted for themselves.<sup>24</sup> Such laws may also suffer from debate over whether they should be aspirational in nature—which would often make them different from similar laws that legislators impose on other state officials or state employees—or more detailed and normative.

Disclosure laws in particular may be fraught with loopholes—intentional or not—e.g., allowing certain activity at out-of-state events that may not be permitted in-state, permitting lobbyists to split tabs for entertaining legislators across multiple clients or between themselves and other lobbyists to avoid more detailed disclosure, or valuation of certain transactions may be artificial (such as the cost of a suite ticket to a sold-out Indianapolis Colts playoff game or a regular ticket to the Super Bowl).

As is the case with many other laws, compromise can also serve to weaken the most important parts, and because ethics issues are not always partisan in nature, party cues may be lacking in such debates.

The very composition of the bodies making the laws has an impact. Legislators may have a self-interest in not seeking or voting in favor of effective ethics reforms.<sup>25</sup> And even between the legislative bookends of the sincere reformers and those who may seek to do nothing are those who pay lip service to reforms for image purposes (but really do not want such reform), and those who want to take action—but privately desire that action merely to be token, so as to head off any meaningful initiatives.

A lack of significant public input also potentially weakens ethics laws. When the public is not involved in—or shut out of—the drafting process, this circumstance lowers the level of acceptance and fosters a “business as usual” attitude.

But the public is not always “right,” and an ethics bureaucracy that becomes too unwieldy, technical in nature, or oriented toward a “gotcha” mentality may not be appropriate, either.

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22. See Edward D. Feigenbaum, *A Model Process for a Model Law*, 3 PUB. INTEGRITY 1 (2001).

23. See RULES OF THE HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH GENERAL ASSEMBLY OF INDIANA 2005, at 47 (2005); [SENATE] 2005 STANDING RULES AND ORDERS ONE HUNDRED FOURTEENTH INDIANA GENERAL ASSEMBLY 87-96 (2005).

24. See GOVERNMENTAL AFFAIRS SOCIETY OF INDIANA, CODE OF ETHICS (1996).

25. Beth A. Rosenson, *Legislative Voting on Ethics Reforms in Two States*, 5 PUB. INTEGRITY 205 (2003).

The preferences of the more advanced moralists of society—the so-called “public interest” groups—are frequently accused of advocating such tight restrictions on legislative actions that many would be frozen out of public service, the business of government would be nigh impossible to conduct, and the cost of government would soar.<sup>26</sup>

Policymakers plead not to criminalize legitimate policymaking, and to offer some “bright-line” tests because much proscribed activity is not always intuitively “wrong.”<sup>27</sup>

Of course, in the end, the law is but an ethical minimum. Legislators may be technically complying with law, but not necessarily practicing ethical behavior. Some—such as Oliver North—may believe that a given course of activity is right, but it may also be illegal. So we are still ultimately dependent upon the quality of individuals we choose to represent us in office.<sup>28</sup>

The Sundance Kid once queried cohort in crime Butch Cassidy about Bolivia. Sundance asked Butch, “What could they have here that you could possibly want to buy?”<sup>29</sup> But there is a lot at stake in Indiana these days, as evidenced in the deep public policy debate over items such as telecommunications deregulation, and \$3.85 billion highway lease contracts.

As a result, Indiana should give some thought to these concepts and adopt the philosophy that Mark Twain sent in a note to the Young People’s Society at the Greenpoint Presbyterian Church in Brooklyn in 1901: “Always do right. This will gratify some people, and astonish the rest.”<sup>30</sup>

If it does so, the Indiana General Assembly in 2010 will not be the same as the world of Mark Twain in *Huck Finn* some 150 years ago.

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26. See FRANK ANECHARCO, *THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE* (1996).

27. But see DENNIS F. THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* 84 (1987) (stating “whether the expansion of the legal liability of officials would inhibit legitimate political activity surely depends on what standards of trust we establish for various public offices, and how precisely we formulate them”).

28. See Martin Tolchin, *Suddenly, It’s Open Season on Public Servants*, N.Y. TIMES, Oct. 26, 1986, § 4, 4.

29. BUTCH CASSIDY AND THE SUNDANCE KID (John C. Foreman 1969); see Internet Movie Database, *Memorable Quotes from Butch Cassidy and the Sundance Kid*, <http://www.imdb.com/title/tt0064115/quotes> (last visited May 12, 2006).

30. Mark Twain, *Note to the Young People’s Society* (Feb. 16, 1901), in JOHN BARTLETT, *FAMILIAR QUOTATIONS* § 28:3 (1992).

# INDIANA CENTER ON GOVERNMENT ETHICS: A PROPOSED BIRTH\*

DAVID H. MAIDENBERG\*\*

## INTRODUCTION

The purpose of this paper is to explore the creation of the Indiana Center on Government Ethics. In this document, I will discuss problems the Center could address, how such a center might function, its potential challenges, and its potential benefits.

I use the term “government ethics” broadly and include matters in which private interests can tilt—or can be reasonably perceived as tilting—public actions. Included in this is campaign finance, where political contributions may be seen as buying either access or outcomes. The term includes the potential impact that professional lobbyists may wield in their interactions with policymakers. It includes election administration, where laws, districting, or management may impact or even preordain election outcomes. Also included are issues pertaining to standards of conduct for individuals serving in government. Ethics, as used here, does not include matters of personal conduct by public servants unrelated to their positions.

The intended audience for this paper includes prospective partners: individuals and organizations that could participate in some way in the concept, development, and operation of the Center. If an ethics center of this type is to succeed in Indiana, it will only happen with the assistance and support of many. Funding, other physical resources, ideas, experience, creativity, and credibility are just a few of the assets that would be required if this concept is to advance. The ideas in this document should be considered only a starting point. Hopefully, those who read this will respond with suggestions for improving upon these ideas.

## I. THE PROBLEMS

Every few years, one or more Indiana newspapers publish an exposé detailing an ethics failing of the Indiana General Assembly. These have included the “Statehouse Sellout” series of the 1990’s,<sup>1</sup> the Build Indiana Fund (“BIF”)

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\* This paper is revised from a paper privately disseminated in August 2003.

\*\* David H. Maidenberger served as director of the Indiana State Ethics Commission from 1997 through 2001. As director, Maidenberger coordinated training, advising and enforcing of executive branch ethics laws in Indiana state government.

1. Suzanne McBride et al., *Statehouse Sellout: How Special Interests Hijacked the Legislature*, INDIANAPOLIS STAR, Feb. 11-15, 1996, at A1; Suzanne McBride & Janet E. Williams, *Statehouse Sellout: Business as Usual*, INDIANAPOLIS STAR, Apr. 13-15, 1997, at A1; Suzanne McBride & Janet E. Williams, *Statehouse Sellout: Following the Money*, INDIANAPOLIS STAR, Aug. 10-13, 1997, at A1; Suzanne McBride & Janet E. Williams, *Statehouse Sellout: The Business of Lawmaking*, INDIANAPOLIS STAR, Jan. 18-20, 1998, at A1; Suzanne McBride & Janet E. Williams, *Statehouse Sellout: The Prospects for Change*, INDIANAPOLIS STAR, Mar. 1-3, 1998, at A1.

problems from 2001,<sup>2</sup> various articles on “revolving door” issues,<sup>3</sup> as well as potential conflicts of interest between members’ legislative duties and their careers.<sup>4</sup>

What is rarely examined is the institutional failing within the Indiana legislature to establish a comprehensive ethics structure as so many other state legislatures have done.<sup>5</sup> Such a program, with professional staff, could establish arms-length and specific standards of conduct; develop a body of advisory opinions, precedents, and casework; and provide ethics training to legislators and staff. What little ethics guidance exists now emanates largely from informal discussions between members—sometimes within the ethics committee framework—but virtually never with a written record. A more formalized ethics structure might also have the capacity to head off programmatic failings such as those built into BIF.

Although committees on ethics exist in both houses of the legislature, they are woefully ill-equipped, structurally and otherwise, to provide the type of independent, pro-active approach that is needed. Such an arms-length ethics program exists in the executive branch.<sup>6</sup> It exists, to at least some degree, in most legislative branches in other states—but not in Indiana. This vacuum makes it inevitable that problems will arise—and then fester.

Legislators are not the only group of Hoosier public servants in need of an ethics structure. Most local governments in Indiana have the same problem.<sup>7</sup> Although many states extend coverage of civil ethics laws to at least some local officials, Indiana does not.<sup>8</sup> The jurisdiction of the Indiana State Ethics Commission is limited to the executive branch of state government. With the exception of criminal penalties—applicable only in extreme circumstances—most local officials have no guidelines concerning conflicts of

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2. Michele McNeil Solida, *Projects Get Millions in Violation of State Law*, INDIANAPOLIS STAR, June 24, 2001, at A1.

3. Kelly Lucas, *Former House Speaker Turns Lobbyist*, IND. LAW., Dec. 5-18, 2001, at 5; Mary Beth Schneider, *Legislator Follows Trend with Departure*, INDIANAPOLIS STAR, Nov. 21, 2001, at B1; Tim Swarens, *Unwilling to Resist the Lure of Gamin Industry’s Call*, INDIANAPOLIS STAR, Nov. 21, 2002, at A26.

4. Janet E. Williams & Suzanne McBride, *Personal Stakes Anchor Some Legislation*, INDIANAPOLIS STAR, Jan. 19, 1998, at A1.

5. For information and examples of other states’ legislative ethics structures, see National Conference of State Legislatures Center for Ethics in Government, *State Ethics Commissions: Jurisdiction*, [http://www.ncsl.org/programs/ethics/ec\\_jurisdiction.htm](http://www.ncsl.org/programs/ethics/ec_jurisdiction.htm) (last visited May 18, 2006).

6. See the Indiana State Ethics Commission, as governed by IND. CODE §§ 4-2-6-1 to -14 (2005); Ethics and Conflicts of Interest. For examples in other states, see the National Conference of State Legislatures Center for Ethics in Government, *supra* note 5.

7. A few municipalities have their own ethics ordinances, usually including a board or commission. These include: Indianapolis/Marion County, Fort Wayne, Kokomo, Jeffersonville, Valparaiso, and Portage.

8. David H. Maidenbergh, *Ethics Update*, COUNCIL ON GOVERNMENTAL ETHICS LAWS (COGEL), Dec. 2000.

interest, gifts, nepotism, or personal use of government property. As a result, problems commonly arise. A few examples include:

- A mayor accepted an all expense paid trip to an out-of-state football game, as well as other gifts from vendors of other city projects. No law, civil or criminal, was violated. There was no disclosure requirement.<sup>9</sup>
- Another mayor used a city credit card to charge more than \$8000 in personal expenses, including wedding rings, finance charges, and late fees. Following a state audit, he took out a personal loan and paid off the card. The county prosecutor said no laws were broken.<sup>10</sup>
- A county commissioner, whose public responsibilities included approval of all county spending, sold air filtration systems to county agencies. The Commissioner filed disclosure statements for several, but not all, of the sales.<sup>11</sup> The little known disclosures legitimized the disclosed sales under a Byzantine state law.
- A county assessor hired both her mother and her sister to work in her office. Only one of her six person staff was not related to either the auditor or her chief deputy.<sup>12</sup> No law governs nepotism in local offices in Indiana.

Similar failings exist in campaign finance and election law in Indiana. The Washington-based Center for Public Integrity gave Indiana a failing grade in a study examining campaign finance enforcement, filing requirements, and reporting laws for state political party organizations. It is not the first such grade for our state.<sup>13</sup>

Indiana government has taken a piecemeal approach at best to campaign finance matters. Historically, Indiana law has focused almost exclusively on disclosure with few restrictions on how funds may be donated to candidates and spent by their committees.<sup>14</sup> Even so, its system of disclosure, although better in

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9. Diana Vice & Arline Sprau, *Mayor Heath Admits Taking Gifts from City Vendor*, FAMILY TIMES (Lafayette, Ind.) Fall 1999.

10. Cathy Kightlinger, *Mayor Henry Pays off City Credit Card*, CHRON.-TRIB. (Marion, Ind.), Aug. 17, 2001, at 1.

11. Tim Logan, *No Charges for Elkhart County Official; State Audit Uncovers No Wrongdoing*, SOUTH BEND TRIB., Oct. 19, 2001, at A2.

12. *Elected Officials Often Hire Their Own When Jobs Are Vacant*, INDIANAPOLIS STAR, June 9, 2000.

13. The Center for Public Integrity conducted a survey in 2002 examining the reporting, filing, public access, and enforcement filed by state-wide political party committees. Indiana scored a 56 and ranked 32 out of 50, warranting a failing grade. The Center for Public Integrity, *Disclosure Rankings: Nationwide Numbers*, <http://www.publicintegrity.org/partylines/report.aspx?aid=664> (last viewed May 18, 2006).

14. EDWARD D. FEIGENBAUM & JAMES A. PALMER, CAMPAIGN FINANCE LAW 2000: A SUMMARY OF STATE CAMPAIGN FINANCE LAWS WITH QUICK REFERENCE CHARTS (2000) (containing Indiana-specific information in charts 2A and 3A); Janet E. Williams & Suzanne McBride,

certain respects than in some states—thanks to technological innovations—still omits information that many observers find to be important elements of a disclosure system.<sup>15</sup> Indiana never imposed limits on the amounts that individuals or political action committees could contribute to campaigns, leaving itself vulnerable to concerns that one or a few groups can buy the loyalty of—or access to—a public official by financing a large portion of a campaign.

Conventional forms of public financing of campaigns have never been seriously debated in Indiana. Record amounts of funds are often spent on competitive races. Enforcement of what few restrictions exist can be hamstrung by an “FEC-like” election commission, where equal numbers of members are nominated by political party chairs. Local enforcement of campaign finance laws is handled—or ignored—by county election boards with local news media often ill-equipped to provide significant information about local campaign funding and spending. Questions also exist on campaign expenditures. Among them: What are legitimate uses of funds? How much specificity is expected on disclosure of expenditures?

Campaign finance is but one entry point for private interests to skew governmental actions. Others include the private interests of public servants—and elections, where limiting competition can predetermine the outcome. Another significant entry-point in Indiana is lobbying. Our lobby law, rife with ambiguities and inconsistencies, fails to cover many potentially significant lobbyist-legislator interactions. It is based largely on disclosure rather than regulation. Auditing and enforcement are often hamstrung by structural problems with the law.

Non-existent in Indiana is a non-governmental organization that is able to consistently monitor issues related to government ethics. Common Cause Indiana<sup>16</sup> does an admirable job in offering feedback for media consumption, monitoring legislation, and providing committee testimony on ethics, election, and campaign legislation. However, its voice is a lonely one in the Statehouse. The organization is not equipped for ongoing policy analysis and development.

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*Campaign Expenses Padded with Perks*, INDIANAPOLIS STAR, Aug. 19, 1997, at A1.

15. According to *Plugging in the Public*, federal law, the District of Columbia, and twenty-seven states require the contributor’s occupation and employer to be reported. ELIZABETH HEDLUND & LISA ROSENBERG, CENTER FOR RESPONSIVE POLITICS, *PLUGGING IN THE PUBLIC: A MODEL FOR CAMPAIGN FINANCE DISCLOSURE* (1996), [http://www.opensecrets.org/pubs/law\\_plug/plugindex.html](http://www.opensecrets.org/pubs/law_plug/plugindex.html). Indiana law does not require disclosure of one’s employer and requires that occupation be disclosed only for contributions above \$1000. IND. CODE § 3-9-5-14 (2005). A 1998 *Indianapolis Star* survey indicated that ninety-six percent of readers favored tougher campaign finance reporting requirements. Suzanne McBride & Janet E. Williams, *Special Interest Influence Should Be Curbed, Readers Say*, INDIANAPOLIS STAR, Mar. 3, 1998, at A4.

16. See Common Cause Indiana, Homepage, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=192843> (last visited May 18, 2006). Common Cause is a nonpartisan nonprofit advocacy organization founded in 1970 by John Gardner as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest.

News organizations can be effective in reporting on a problem after it has reached a critical point. But no one is charged with the task of establishing, monitoring, advising, or enforcing non-criminal standards of conduct in much of state and local government.

What is lacking in Indiana is a means to work through these issues. Neither within nor beyond government does there exist a structure dedicated to analysis and improvement on such matters. The creation of the Indiana Center on Government Ethics ("ICGE") is proposed to fill this void.

## II. THE INDIANA CENTER ON GOVERNMENT ETHICS<sup>17</sup>

The Indiana Center for Government Ethics would be a non-profit, non-governmental public policy organization that would objectively assess and focus on government ethics problems. In addition to policy analysis, the ICGE would offer policy options to lawmakers and administrators. It would work to place these problems—and prospective solutions—on the public radar screen and to actively nurture change.

The ICGE would work with public officials, the news media, and the public in undertaking this mission. It would take the point of view that government and public service are necessary and worthy. Its focus would primarily be on Indiana government, both state and local.

The mission of the ICGE would be to elevate government ethics issues in the Hoosier consciousness, focusing public attention on these issues, assisting in the development and analysis of government ethics policies, and providing information and alternatives to Hoosier policymakers and citizens.

### A. *Issues*

What are government ethics issues? As used in this document, government ethics issues are those in which governmental action can be inappropriately influenced by factors involving private interests. That private citizens can and must impact governmental processes is a hallmark of our democracy. Seeking to impact government with speech, protest, and similar actions is quite different, however, than doing so through means considered inappropriate or unlawful. Bribery is certainly beyond the pale of acceptability. Not all such actions are so obvious. In many instances, there are not clear lines between what is appropriate and what is not. When does a campaign contribution cross the line into bribery? When does a gift to a government official move from harmless gratitude to inappropriate influence?

It is fine for a widget manufacturer to vocally oppose and work against a tax on widgets. But when he or she tries to influence the decision by making inordinately large contributions to the campaigns of policy makers or buying gifts for them, then the decision-making playing field can be skewed.

These issues can also be election-related. If parties or other interests act to reduce or eliminate electoral competition through dollars, districting, or election

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17. See Appendix A for possible activities of the ICGE.

laws, then that too can tilt the playing field, often even eliminating any "game."

Legitimate debate over proposed answers may be contentious and solutions illusive. Nevertheless, being attentive to such issues is critical to our government, especially in an era of deep cynicism. In no case should such questions be ignored or the status quo assumed to be a given. Making government work and making its workings honorable take constant effort. In Indiana, far too little effort has been made. These questions of boundaries between what is appropriate and inappropriate—and how these boundaries should be patrolled—are the types of issues on which the ICGE would focus.

### *B. Functions*

Within these issue areas, the ICGE would perform four general functions: policy analysis, issue leadership, information clearinghouse, and education.

*1. Policy Analysis.*—A primary function of ICGE would be policy analysis. Some issues will likely require ongoing monitoring and analysis; others would likely be selected as determined by need and resources and perhaps be a subject of rotating focus.

The ICGE would organize either temporary or ongoing task forces by issue area. The teams would examine Indiana laws, regulations, and ordinances in a given area, find strengths and weaknesses, compare ours to those in other states, and develop proposals as needed for consideration by policymakers. These groups would be composed of individuals who bring a variety of talents and experiences from academia, government, law, and other fields.

Possible subjects for these groups include, but are not limited to, campaign finance, lobby regulation, legislative ethics, local government ethics, election-related matters, local judicial campaigns, and Indiana's criminal statutes dealing with public administration. Over time, other topics would certainly arise to which the Center could respond as deemed appropriate. Issue teams would monitor not only pertinent legislation, but also administrative practices of relevant boards, commissions, and agencies.

*2. Issue Leadership.*—The ICGE's policy analysis function would not stop with a report. Policymakers seldom act to place government ethics issues at center stage. On the few occasions in recent years when such a bill was introduced in the General Assembly, it either languished from a lack of leadership or was pulled apart by differing viewpoints. Issue leadership is no guarantee that an objective will be achieved, but it is certainly a necessary prerequisite. For government ethics bills to advance, the ICGE could fill a void by maintaining an ownership stake in suitable proposals, stewarding them into and finding a way to help them through the lawmaking process and attempting to build coalitions along the way. Like children, sound proposals need nurturing, support, and attention. Conception is critical, but, if left alone, most of this legislation will wither. All too often, the absence of leadership on these issues is fatal.

For example, several times in the last decade, potentially significant campaign finance legislation was introduced, including proposed limits on either contributions or spending. Key players created and endorsed competing

proposals.<sup>18</sup> These were among the few occasions in recent Indiana history when such proposals gathered much attention. The issue quickly died away, however, in the face of stalemate and resistance. No one fought to resuscitate the proposals or expended political capital trying to craft a compromise. Many expressed disappointment and/or criticism—but none could or would step into the process and administer “legislative CPR.” These proposals may have all died anyway, but in the absence of issue leadership, the fatalities were guaranteed.

In the face of legal limitations and on the lobbying activities of charitable organizations and other realities, the ICGE would have to craft and carefully observe appropriate policies concerning any legislative activity in which it decided to engage. Nonetheless, giving or maintaining life to relevant and worthy legislation would hopefully be among the functions of the ICGE.<sup>19</sup>

3. *Information Clearinghouse*.—Another function of the ICGE would be to serve as a clearinghouse on governmental ethics issues. It would collect information, making it available to policymakers, news media, and other interested parties. This information would include laws and policies of other jurisdictions, research studies, and any available online discussions concerning government ethics related matters. More than just a library, through newsletters and other mechanisms, the Center’s clearinghouse would “push” this information on ethics policies and programs to public officials throughout Indiana. It would collect and freely share this data with jurisdictions in and beyond the state.

For example, very few local governments in Indiana have an ethics program of any kind. Those that wish to develop one have few resources to consult. Cities or counties that have or want such laws are unlikely to communicate with one another or even know which other entities to contact. Yet there are many models around the country and a wide variety of experiences for government officials to use and to share—if there was only a well-informed link.<sup>20</sup> The ICGE can be such a link, not only in providing requested information and researching

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18. Emblematic of this were the campaign finance reform machinations in the 1997 session of the Indiana General Assembly, described well in the column by Mary Beth Schneider. Mary Beth Schneider, *Too Many Chefs in the Legislature Might Be Spoiling Recipe for Reforms*, INDIANAPOLIS STAR, Mar. 2, 1997, at C1.

19. “In general, no organization may qualify for section 501(c)(3) status if a substantial part of its activities is attempting to influence legislation (commonly known as lobbying). A 501(c)(3) organization may engage in some lobbying, but too much lobbying activity risks loss of tax-exempt status.” Internal Revenue Service, Political and Lobbying Activities, <http://www.irs.gov/charities/charitable/article/0,,id=120703,00.html> (last visited May 18, 2006).

20. Examples of such models include: National Civic League, *Model City Charter Revision Project—Eighth Edition*, <http://www.ncl.org/npp/charter/memos/ethics.html> (last visited May 18, 2006); Municipal Research and Services Center of Washington, *Sample Codes of Ethics*, <http://www.mrsc.org/subjects/personnel/ethics.aspx> (last visited May 18, 2006); Association of Minnesota Counties, *Model Ethics Policy*, [http://www.mncounties.org/Publications/FYIs/02%20FYI%20PDFs/Model\\_Ethics.pdf](http://www.mncounties.org/Publications/FYIs/02%20FYI%20PDFs/Model_Ethics.pdf) (last visited May 18, 2006); Illinois Attorney General, *Ensuring Open and Honest Government: Model Ethics Ordinance*, [http://www.ag.state.il.us/government/ethics\\_ordinance.html](http://www.ag.state.il.us/government/ethics_ordinance.html) (last visited May 18, 2006).

issues upon request, but also in placing information on the desks and in the minds of public officials.

A few years ago, the Kentucky State Auditor's Office produced a study on how its state law on local ethics was functioning.<sup>21</sup> Part of the study included an exploration of selected other states, how they handled local ethics, and the pros and cons of each.<sup>22</sup> This study, like many other research projects produced around the nation, can be of great use to policymakers, not only in Indiana, but across the nation.

Many entities, both within and beyond government, have conducted research that could be highly useful to policymakers.<sup>23</sup> Groups such as the Council on Government Ethics Laws ("COGEL"), National Civic League, Campaign Finance Institute, California Voter Foundation, and others have produced studies that should be collected, catalogued, and made available to others. This would be a key function of the ICGE. Informing current and would-be policymakers, among others, as to how various entities deal with such problems may sensitize Hoosiers to the options that exist for ethics-related laws in Indiana.

4. *Education.*—Another function of the ICGE would be to provide education. This could take several forms. One principal function would be to raise public awareness of government ethics problems as well as potential solutions. Although similar to the clearinghouse function, the focus here would be more general—and more on the public than on policymakers.

For example, the ICGE could provide speakers to groups around Indiana. During such a forum, the ICGE speaker could discuss not only the purpose and activities of the ICGE, but the primary issue areas on which it is focusing at the time. This can include the problems, potential solutions, roadblocks, and what the audience might do to help. Information might also be provided on legislative priorities for consideration both in the General Assembly and by local governments.

Similar opportunities for public education can be created through opinion-editorial ("op-ed") pages and other media, where the ICGE can inform and try to engage Hoosiers in the process of improving governmental processes in Indiana. Through public engagement, policymakers can be encouraged to elevate these

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21. EDWARD B. HATCHETT, JR., AUDITOR OF PUBLIC ACCOUNTS, LOCAL GOVERNMENT ETHICS CODES AND BOARDS: PERFORMANCE AUDIT (2000), *available at* [http://www.auditor.ky.gov/Public/Audit\\_Reports/Archive/2000LocalGovernmentEthicsCodeBoards.pdf](http://www.auditor.ky.gov/Public/Audit_Reports/Archive/2000LocalGovernmentEthicsCodeBoards.pdf).

22. *Id.* at 32-39.

23. Council on Government Ethics Laws, [www.cogel.org](http://www.cogel.org) (last visited May 18, 2006) (producing a model government ethics and campaign finance law and providing annual updates on significant events occurring within its purviews of interest: campaign finance, ethics, freedom of information, and lobbying); National Civic League, <http://www.ncl.org/> (last visited May 18, 2006) (publishing important reports and ethics provisions for city charters); Campaign Finance Institute, <http://www.cfinst.org> (last visited May 18, 2006) (producing public forums and research on campaign disclosure, the impact of campaign finance reform, and political convention financing); California Voter Foundation, <http://www.calvoter.org> (last visited May 18, 2006) (studying and reporting on topics including campaign disclosure, voter engagement, and voting technology).

matters on the public agenda.

The ICGE can also undertake more formal education, offering ethics training classes and workshops for public officials. It could also work to develop an ethics curriculum for political science and public affairs students.

These four functions would be at the core of the ICGE. More examples of activities within these functional areas can be found in Appendix A.

### *C. Structure & Operations*

The ICGE, as envisioned by the author, will be an independent, not-for-profit corporation. It will have staff (volunteer, at least in the beginning), a respected and knowledgeable Board of Directors to provide governance, supplemented, perhaps, by a Board of Advisors.

Credibility will be a necessary asset of the ICGE. Participants will need to be both bi-partisan and, at the same time, non-partisan: Democrats, Republicans, and others will need to be present and involved. Although their involvement would be sensitive to the partisan nature of Indiana's political culture, their actions at the Center should strive to be non-partisan. One can expect lawmakers to be skeptical of a new organization that may be proposing limits on the conduct of those lawmakers. Some of that skepticism will never be displaced, but at a minimum the ICGE will have an obligation to provide partisan balance as well as a good working knowledge of government.

The ICGE would have to be much more than a one or two person show. Not only are varied skills needed, but its success depends in part upon bringing together knowledge of and ties to the governmental and non-profit sectors. A great deal of talent in these areas exists throughout Indiana. Attracting and involving such individuals will be a necessary challenge for the ICGE.

The ICGE will work closely with Hoosier academic institutions. A number of potential partnership opportunities exist with different programs, centers and departments, including, but certainly not limited to, the Program on Law & State Government at the Indiana University School of Law—Indianapolis,<sup>24</sup> the Mike Downs Center for Indiana Politics at Indiana University—Purdue University Fort Wayne,<sup>25</sup> and the Poynter Center for the Study of Ethics and American Institutions at Indiana University—Bloomington.<sup>26</sup>

Policy research by students and faculty as well as work internships are just two examples of assistance that can be provided from academia. In turn, the ICGE can provide students with an opportunity for hands-on experiences to learn and impact public policies on government ethics.

Mutually beneficial partnership possibilities also exist with other non-profit organizations. A few examples include the Indiana Association of Cities &

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24. Program on Law and State Government, Indiana University School of Law—Indianapolis, [http://indylaw.indiana.edu/Programs/Law\\_State\\_Gov](http://indylaw.indiana.edu/Programs/Law_State_Gov) (last visited May 18, 2006).

25. Mike Downs Center for Indiana Politics, Indiana University—Purdue University—Fort Wayne, <http://www.mikedownscenter.org/> (last visited May 18, 2006).

26. Poynter Center for the Study of Ethics and American Institutions, Indiana University—Bloomington, <http://poynter.indiana.edu/> (last visited May 18, 2006).

Towns<sup>27</sup> and the Association of Indiana Counties<sup>28</sup>—each with strong knowledge of local government and the ability to communicate with its officials. Governmental entities such as the Indiana Lobby Registration Commission<sup>29</sup> and the Indiana Election Commission,<sup>30</sup> as well as related non-governmental organizations such as the Governmental Affairs Society of Indiana<sup>31</sup> possess expertise and resources that can benefit the Center's work. In addition to these and many more Hoosier organizations, collaboration opportunities also exist with national organizations, such as the Center for Public Integrity in Washington.<sup>32</sup>

This paper does not pretend to paint a complete picture of how the ICGE would be structured and operate. At this stage, not even all the questions—much less the answers—can be conceived. The objective of this document is to provide a general concept that can be modified and built upon.

#### *D. Funding*

Obtaining sufficient funding would no doubt be the single greatest challenge for the ICGE. Since the work of the ICGE would focus on Indiana, perhaps philanthropic resources within Indiana could be attracted. Foundations, family charitable entities, corporations, and individuals might plausibly be attracted as financial supporters of this unique venture in Indiana. With a focus on ethics, it is also plausible that innovative fundraising among churches and other religious and civic institutions could yield positive results. Reaching out to these groups for even low-level financial assistance provides several potential benefits. In addition to possible revenue for the ICGE, these organizations can provide a means of engaging Hoosiers in government ethics issues. Seminars and training programs may also have some potential to provide supplementary income.

Realistically, the beginnings of the ICGE will likely be austere. Yet, projects such as the information clearinghouse can likely be undertaken with minimal resources, as can other programs that could help the ICGE establish credibility, partnerships, and priorities.

### III. WHAT NEXT?

The immediate priority in creation of the ICGE is completing the formal organizational process, seeking 501(c)(3) status, attracting people, building a

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27. Indiana Association of Cities and Towns, <http://www.citiesandtowns.org> (last visited May 18, 2006).

28. Association of Indiana Counties, <http://www.indianacounties.org> (last visited May 18, 2006).

29. Indiana Lobby Registration Commission, <http://www.in.gov/ilrc/> (last visited May 18, 2006).

30. Secretary of State: Indiana Elections Commission, <http://www.in.gov/sos/elections/iec/index.html> (last visited May 18, 2006).

31. Governmental Affairs Society of Indiana ("G.A.S.I."), <http://www.governmentalaffairsociety.org/> (last visited May 18, 2006).

32. Center for Public Integrity, <http://www.publicintegrity.org/> (last visited May 18, 2006).

website and beginning the planning process for the work of the ICGE.<sup>33</sup>

#### IV. CONCLUDING THOUGHTS

The ICGE would bring together talent and experience for the purpose of analyzing and developing laws and policies furthering ethics in Hoosier government and elections. It would gather and share information on how other jurisdictions accomplish these ends, examine the advantages and disadvantages of such approaches, and consider what might work in Indiana's unique political culture. It would work with Hoosiers to raise public awareness of these issues and to enact positive changes.

Is it realistic that such a center can be created and function in the Hoosier political culture? There are numerous reasons why the odds favor a negative response. Challenges in raising financial resources would be among those at the top of the list. Public cynicism or disinterest also weighs against success. Reluctance among potential institutional partners to make waves among lawmakers and others who can impact their institutional well-being may also dissuade some who otherwise might be favorably disposed.

While acknowledging the challenges, I prefer to think that now is a good time to make this effort. There is an increased sensitivity to ethics—thanks in part to embarrassments and scandals that have been in the news recently. With the news media quick to point out instances of ethical lapses by government insiders, some of those insiders may welcome assistance in exploring other methods of operation. Certainly, many insiders will be wary of the ICGE or any effort that may favor the development of tighter standards of behavior either on political campaigns or conduct in office. Yet, these same policymakers are finding their environment under the stress of vastly increasing amounts of special interest influence in the form of campaign contributions, intense lobbying, issue advertisements, and other pressures. Some have begun expressing concerns that they are “increasingly called upon to referee market-share battles between billionaires.”<sup>34</sup> Those wary of this trend may, too, find a high quality policy research center to be an idea whose time has come.

If the ICGE does its job well, it would ultimately be seen as a pro-government resource. It may rankle some in power—and would at times—but it would, hopefully, come to be viewed as a credible partner of Hoosier policymakers—and not as a stone thrower—although, there will be times for criticism. One hopes that a long-term result of the ICGE would be to reduce cynicism of government.

Again, this document offers only preliminary ideas for the Indiana Center on Government Ethics. It is not an operations manual for a new organization, but a starting point for discussion.<sup>35</sup>

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33. Those wishing to help are welcome to contact the author at david@maidenberg.com.

34. “*Stuff of Government*” at Stake?, 15 IND. LEGIS. INSIGHT No. 9, Feb. 24, 2003, at 1.

35. Feedback and assistance from readers is welcomed and appreciated.

## **APPENDIX A**

### **Possible Activities of the ICGE (by function)**

These are examples of activities that could be performed by the Center in furtherance of its mission. This is intended as a sampling of possible activities and not a comprehensive list of all that the Center might do. Its listing by function is somewhat oversimplified, as many activities could pertain to multiple functions.

#### **POLICY ANALYSIS**

##### **Legislative Branch Ethics:**

- Research ethics structures and codes for state legislatures and consider which options might be applicable to Indiana.
- Develop proposals for an ethics code for the legislative branch, as well as an administrative mechanism to provide training, advisory opinions, and enforcement.
- Examine Indiana's personal financial disclosure laws for legislators, including strengths and weaknesses. Seek to work in cooperation with the Center for Public Integrity, which has studied these laws in Indiana and across the nation.
- Develop a proposal for improving the disclosure program. (This may have application to other branches of government as well.)

##### **Executive Branch Ethics:**

- Examine whether ethics laws should apply more comprehensively to members of state boards and commissions.
- Examine whether ethics laws should be amended to facilitate the payment of financial incentive awards by state government and, if so, how.
- Study laws pertaining to conflict of interest for state contractors (IND. CODE § 5-16-11 (2005)) and consider options for improving or abolishing this little understood section of law.
- Study whether (and if so, how) ethics laws should be made applicable to "temps" who otherwise look and act like state employees but are actually contractors or employees of private businesses.

**Local Government Ethics:**

- Survey local governments, examine ethics issues, and examine whether and how such matters are handled for both employees and officials.
- Seek to work in cooperation with groups such as the Indiana Association of Cities and Towns and the Association of Indiana Counties.
- Examine options for development of proposed, uniform standards of conduct for local government officials in Indiana.

**Campaign Finance:**

- Perform a complete “inventory” of Indiana campaign finance law, practices, and perceptions. Compare Indiana campaign finance law to laws and practices in other states.
- Examine disclosure of campaign expenditures for specificity and compliance.
- Examine the advantages and disadvantages of imposing limits on campaign contributions or spending.
- Study ways in which campaign disclosure reports can be improved.
- Examine how local election boards enforce and monitor campaign finance reporting.
- Study the dynamics of fundraising in party caucuses and any impact it may have on legislation.
- Examine the strength and weaknesses of media coverage on state and local campaign finance practices, perhaps offering seminars by experienced reporters for those who may wish to learn more.
- Study the effect Indiana campaign finance laws may have on political competition in Indiana.

**Lobby Law:**

- Perform a complete “inventory” of Indiana lobby law, practices, and perceptions. Compare Indiana to laws and practices in other states.
- List the ambiguities that have been cited in the state lobby law in recent years, examine whether they have been dealt with in any effective way, and propose means of dealing with those that have not.
- Examine the Lobby Registration Commission’s auditing and enforcement difficulties.
- Examine the interplay of lobbying and campaign finance and examine whether legislation should be proposed for dealing with any problems found.
- Examine whether lobby regulation should be extended to the executive branch of state government, and if so, how.

**Election Administration:**

- Measure and monitor levels of political competition in Indiana, especially in legislative races.
- Examine whether and how the redistricting process in the legislature can be improved to allow for more increased competition.

**Criminal Law:**

- Examine Indiana's criminal law on conflict of interest (IND. CODE § 35-44-1-3 (2005))—its implementation, enforcement, strengths and weaknesses—and seek ways to improve or replace this cumbersome statute.
- Study all of Indiana's criminal statutes (IND. CODE § 35-44 (2005)) dealing with public administration, perhaps in cooperation with the Indiana Prosecuting Attorneys Council.

**ISSUE LEADERSHIP:**

- Monitor all legislation potentially impacting ICGE issue areas and share this information with the public.
- Seek to have ICGE proposals introduced and advanced in the state legislature (or other applicable lawmaking bodies) and attempt to build coalitions for these proposals before and during the legislative process.
- Provide analysis and comment at public hearings on legislation when deemed appropriate.

**CLEARINGHOUSE:**

- Create a government ethics library with information on various approaches dealing with various government ethics issues.
- Publish periodic newsletters and distribute them freely to policymakers throughout Indiana.
- Establish a website for easy access to collected research on government ethics programs.
- On the ICGE's website, develop a set of pages on "How Others Do It," showing Hoosiers that many alternatives exist for sound practices in all areas of government ethics.
- Seek to create a consortium of government ethics organizations in Indiana in order to facilitate interjurisdictional communication on relevant issues. This may include state and local ethics and campaign finance officials, lobby regulators, prosecutors, and others.
- Actively share research and resources with sister organizations, such as COGEL.

**EDUCATION & PUBLIC AWARENESS:**

- Sponsor periodic seminars on government ethics issues, such as an annual conference.
- Sponsor an occasional luncheon speaker or forum in one or more parts of the state.
- Publish an “annual report” on government ethics issues and practices in Indiana, highlighting matters that have been both problems and successes throughout the year.
- Offer periodic op-ed columns to newspapers around the state.
- Offer training seminars on government ethics issues. (This could be done even in the absence of official guidelines.)
- Offer continuing education classes to professional groups. For example, the ICGE could sponsor an ethics component of continuing education for attorneys interested in government and public affairs.
- Conduct a forum for the news media, discussing media issues in reporting on campaign finance and ethics matters.
- The ICGE might consider making good citizenship awards for exemplary ethics or for high quality reporting of government ethics issues.
- Offer a speakers bureau.
- Periodically survey Hoosiers’ attitudes toward government, pertinent issues, and prospective solutions. Tracking these attitudes over time would be of interest, as would comparing Hoosiers’ attitudes to other regions of the country.



# ELIMINATING POLITICAL MANEUVERING: A LIGHT IN THE TUNNEL FOR THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE

PATRICIA E. SALKIN\*  
ALLYSON PHILLIPS\*\*

## INTRODUCTION

The art of lawmaking is a political process engaging elected representatives and appointed officials in public policy debates over issues currently in need of attention. When judges decide cases, the rule of precedence dictates that the common law be followed. The United States has long recognized the common law privilege afforded to certain conversations between attorneys and their clients, and the American Bar Association and states across the country have advanced rules of professional conduct for attorneys that include as a foundational concept the necessity of preserving the confidentiality of information communicated from a client to his or her attorney. Whether this privilege is equally applicable in both the public and private sectors remains controversial at best, and it has been used as political leverage in attempts to uncover what might otherwise be confidential information, leaving government lawyers and their clients with a level of unreasonable uncertainty regarding the sanctity and security of their professional relationship.

Federal court cases from 1997 to 2002 cast a significant shadow of doubt on the existence of the attorney-client privilege in the government context.<sup>1</sup> These cases, all involving high ranking elected government officials or their offices, shared at least one significant common element: in each case a government lawyer was subpoenaed to testify before a federal grand jury regarding alleged criminal wrongdoing on the part of an individual government official, and in each case the attorney refused to testify, citing, among other issues, the attorney-client privilege. It was not until 2005 that one federal circuit court broke rank with three other circuit courts, stating emphatically that indeed such a privilege of confidentiality exists, and that it is alive and well in the public sector, or at least in the public sector in the Second Circuit.<sup>2</sup>

This Article builds upon previous work examining the existence of the government attorney-client privilege.<sup>3</sup> In addition to reintroducing the historical

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1. See *In re* Witness Before the Special Grand Jury, 288 F.3d 289 (7th Cir. 2002); *In re* Lindsey, 158 F.3d 1263 (D.C. Cir. 1998); *In re* Grand Jury Subpoena Duces Tecum, 122 F.3d 910 (8th Cir. 1997).

2. *In re* Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005).

3. See Patricia E. Salkin, *Beware: What You Say to Your [Government] Lawyer May Be Held Against You—The Erosion of Government Attorney-Client Confidentiality*, 35 URB. LAW. 283 (2003).

debate to set the context for an analysis of the Second Circuit decision in *In re Grand Jury Investigation*,<sup>4</sup> this Article offers a new analysis in support of the existence of both a privilege and an ethical duty to maintain client confidences, regardless of whether an attorney's compensation is derived from a private client or a public client. Part I begins with a brief overview of the attorney-client privilege in general. This is followed by a discussion of the privilege in the public sector context, with a particular focus on the recent Second Circuit ruling. Part II focuses on professional responsibility, an area that has been overlooked as a source of authority, for the expectation that attorney-client communications will be kept confidential regardless of whether the client is a government actor or a private individual. In Part III, the work product doctrine is offered as another avenue of authority suggesting the protection of confidential information between attorneys and clients, even in the government context. Part IV provides recommendations for potential state and federal legislation to clarify the privilege statutorily, as well as potential reforms to rules of professional conduct for lawyers and a roadmap for a possible future decision from the U.S. Supreme Court.

## I. OVERVIEW OF THE ATTORNEY-CLIENT PRIVILEGE

### A. Purpose of the Privilege<sup>5</sup>

Dating back to the sixteenth century, the attorney-client privilege is the oldest of the privileges in an attorney-client relationship.<sup>6</sup> It was created for the purpose of protecting the oath and honor of the attorney.<sup>7</sup> As a result, in its earliest form, the privilege could only be waived by the attorney.<sup>8</sup>

Over time, the policy reasons for the privilege have changed.<sup>9</sup> Today the privilege is promoted as necessary to ensure "freedom of consultation between

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4. 399 F.3d 527 (2d Cir. 2005).

5. The following sections dealing with the historical development of the attorney-client privilege were first discussed in Salkin, *supra* note 3.

6. Salkin, *supra* note 3, at 284; Marion J. Radson & Elizabeth A. Waratuke, *The Attorney-Client and Work Product Privileges of Government Entities*, 30 STETSON L. REV. 799, 801 (2001); see *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); see also 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (McNaughton rev. 1961).

7. Salkin, *supra* note 3, at 284; see Bryan S. Gowdy, Note, *Should the Federal Government Have an Attorney-Client Privilege?*, 51 FLA. L. REV. 695, 698 (1999) (citing WIGMORE, *supra* note 6); see also Katherine L. Kendall, Note, *In re Grand Jury Subpoena Duces Tecum: Destruction of the Attorney-Client Privilege in the Government Realm?*, 1998 UTAH L. REV. 421, 422.

8. Salkin, *supra* note 3, at 284; see, e.g., 8 WIGMORE, *supra* note 6; Gowdy, *supra* note 7, at 697-98; Kendall, *supra* note 7, at 422.

9. Salkin, *supra* note 3, at 284; see Kendall, *supra* note 7, at 422 (noting that the change occurred because of the increase in legal business, and the increase in the complexity of legal matters that lead to a greater demand for representation).

the client and attorney.”<sup>10</sup> To achieve this goal, the privilege requires that all communications between the attorney and the client be kept confidential absent the client’s consent.<sup>11</sup> One rationale for the attorney-client privilege is that promoting freedom of consultation “encourages full and frank communication between attorneys and their clients[,]” enabling an attorney to properly represent a client because it is more likely that the client will disclose all relevant facts.<sup>12</sup> The freedom of consultation is also designed to encourage clients to seek legal counsel in the earliest stage of their conflict.<sup>13</sup> Perhaps the most compelling justification for the privilege is that it “promote[s] broader public interests in the observance of law and administration of justice [by] recogniz[ing] that sound legal advice . . . depends upon the lawyer being fully informed by the client.”<sup>14</sup>

### *B. Defining the Scope of the Privilege*

In his treatise on evidence, Wigmore organizes the privilege into the following eight elements, all of which are required for the privilege to attach:

- [1] Where legal advice of any kind is sought
- [2] from a professional legal adviser in his capacity as such,
- [3] the communications relating to that purpose,
- [4] made in confidence
- [5] by the client,
- [6] are at his instance permanently protected
- [7] from disclosure by himself or by the legal adviser,
- [8] except the protection be waived.<sup>15</sup>

At times, government lawyers may have difficulty in satisfying each of these elements because of the nature of the work performed by lawyers in the public sector. For example, the first element requires that the lawyer must be providing legal advice. Although government lawyers are often called upon to interpret constitutions, statutes, and caselaw, government lawyers—particularly in the executive and legislative branches—may also function as political and policy advisors, offering strategic advice on how to design specific initiatives to ensure

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10. Salkin, *supra* note 3, at 284; Gowdy, *supra* note 7, at 698 (internal quotation marks and citation omitted) (noting that the privilege began to take its modern form in the eighteenth century); *see also* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (holding that the privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”).

11. Salkin, *supra* note 3, at 284; *see* Gowdy, *supra* note 7, at 698; *see also* Radson & Waratuke, *supra* note 6, at 799 (stating that “[t]he confidentiality inherent in the privilege lies at the heart of the American judicial system”).

12. Salkin, *supra* note 3, at 284-85; *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

13. Salkin, *supra* note 3, at 285; *see Upjohn*, 449 U.S. at 389.

14. *Upjohn*, 449 U.S. at 389.

15. Salkin, *supra* note 3, at 285; 8 WIGMORE, *supra* note 6, § 2292, at 554.

maximum political support while, of course, ensuring legality. Where counsel relates to non-substantive legal matters, these conversations might not be covered by the privilege.<sup>16</sup> Similar analysis might pertain to the second element if, arguably, lawyers do not function as a “legal adviser” when offering strategic policy advice rather than substantive legal analysis. The fifth element, that the advice be sought “by the client,” can also be problematic in the government context as government lawyers constantly struggle to define with precision who is the client of the government lawyer. The literature is full of robust debate on this point with arguments advanced that the client can be an individual public official, an agency or department within the government, the government as a whole, or the public at large.<sup>17</sup>

### C. Privilege in the Government Setting

1. *Brief History of Government Attorney-Client Privilege.*—Although courts throughout the country recognize the existence of the attorney-client privilege,<sup>18</sup> there has been more reluctance among the courts to define this privilege in the government context because of the lack of caselaw precedent examining the issue.<sup>19</sup> Thus, although there is a rich legal history examining and interpreting the scope of the attorney-client privilege in the private context, there is nothing akin to this body of authority that would necessarily be applicable to the government lawyer.<sup>20</sup> In fact, prior to 1967 and the passage of the Freedom of Information Act (“FOIA”), there was little application of the privilege in the government context at all.<sup>21</sup> In adopting FOIA, Congress sought “to permit access to official information long shielded unnecessarily from public view and attempt[ed] to create a judicially enforceable public right to secure such information from

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16. See generally Todd A. Ellinwood, “In the Light of Reason and Experience”: *The Case for a Strong Government Attorney-Client Privilege*, 2001 WIS. L. REV. 1291.

17. See, e.g., JEFFERY ROSENTHAL, *ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS* (ABA 1999); Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L. J. 469 (2002); Michael Stokes Paulsen, *Who “Owns” the Government’s Attorney-Client Privilege?*, 83 MINN. L. REV. 473 (1998); Gowdy, *supra* note 7, at 698; Jesselyn Radack, *Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125 (2003).

18. See 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5475, at 125 (1986); Gowdy, *supra* note 7, at 696 n.4.

19. See Jeffrey L. Goodman & Jason Zabokrtsky, *The Attorney-Client Privilege and the Municipal Lawyer*, 48 DRAKE L. REV. 655, 658-59 (2000); see also Gowdy, *supra* note 7, at 705-06.

20. Salkin, *supra* note 3, at 287; see Gowdy, *supra* note 7, at 706.

21. Salkin, *supra* note 3, at 287; see, e.g., *United States v. Anderson*, 34 F.R.D. 518, 523 (D. Colo. 1963) (holding that the privilege applied to the government). In applying the standards that were typically used to evaluate a corporate privilege, the court failed to make a distinction between corporate and government entities. *Anderson*, 34 F.R.D. at 523; Gowdy, *supra* note 7, at 706.

possibly unwilling official hands.”<sup>22</sup> Despite the importance placed on access to public information, Congress did create nine exceptions to FOIA which would allow the government to keep documents from the public in certain limited circumstances.<sup>23</sup> The inclusion of these exceptions, it has been argued, evidenced the intent of Congress to preserve the attorney-client privilege in spite of the FOIA mandate, and thus extend the privilege to government agencies and their attorneys at times when confidentiality is needed most.<sup>24</sup>

2. *Reasons for the Attorney-Client Privilege in the Government Setting.*—As previously mentioned, the most compelling argument in support of the government attorney-client privilege is the necessity of ensuring that there will be “full and frank communication between [all lawyers] and their clients [(public or private), ultimately] promot[ing] broader public interests in the observance of law and administration of justice.”<sup>25</sup> Just as private practitioners would be impaired by a lack of detailed information if they could not guarantee that their client’s communications would remain protected, government attorneys are hampered by the uncertainty that surrounds the application of the privilege in the public sector, leaving them unable to zealously represent their clients or to uphold the law effectively.<sup>26</sup> More specifically, some have argued that if government officials know that there is a chance that their conversations with their legal counsel are not privileged, and, thus, subject to potential disclosure, they will avoid discussing sensitive matters with counsel, which could lead to legal violations and increased incidences of corruption.<sup>27</sup> Furthermore, it has been suggested that public officials would refrain from seeking legal advice, leaving them unable to effectively carry out their official responsibilities and policy objectives or to implement needed government programs.<sup>28</sup> In one of the most sobering predictions, some assert that absent a privilege in the government context, people might be unwilling to serve in public office in the years to come.<sup>29</sup>

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22. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 80 (1973), *superseded by statute*, Freedom of Information Act, Pub. L. No. 93-502, § 2(a), 88 Stat. 1563 (1973). *Mink* was the first FOIA case heard by the Supreme Court.

23. See 5 U.S.C. § 522(b) (2000); see also Gowdy, *supra* note 7, at 707 (noting that these exceptions were created because some lawmakers feared that the FOIA had the potential to impede upon the “full and frank exchange of opinions” between government agents (citing H.R. Rep. No. 89-1497, at 10 (1966), as reprinted in 1966 U.S.C.C.A.N. 2418, 2427)).

24. See Gowdy, *supra* note 7, at 708.

25. Salkin, *supra* note 3, at 288; *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

26. Salkin, *supra* note 3, at 288; see also *Swidler & Berlin v. United States*, 524 U.S. 399, 412 (1998) (O’Connor, J., dissenting).

27. *In re Witness Before the Special Grand Jury*, 288 F.3d 289, 293 (7th Cir. 2002) (citing *In re Lindsey*, 158 F.3d 1263, 1286-87 (D.C. Cir. 1998)).

28. *Id.* (citing *In re Grand Jury Subpoena Duces Tecum*, 122 F.3d 910, 932 (8th Cir. 1997) (Kopf, J., dissenting)).

29. See also WRIGHT & GRAHAM, *supra* note 18, § 5475, at 127-28. In this leading treatise on federal practice, the authors offer the following rationale in support of government attorney-client privilege: 1) other governmental privileges do not deal with the unique requirements of

3. *Reasons to Restrict the Attorney-Client Privilege in the Government Setting.*—Some argue that because the application of the attorney-client privilege may result in the exclusion of relevant evidence, it stands “in derogation of the search for truth.”<sup>30</sup> And, in the government context, the privilege becomes less tolerable. Therefore, the most persuasive argument against extending the privilege to the government context is that the general public, and not the agency or official, might be the ultimate client.<sup>31</sup> As shown by the fact that a discussion regarding “who is the client of the government lawyer” is fraught with legal uncertainty, unsettled in judicial opinions and law review commentaries, courts have been unwilling to clearly define the “client” of the government lawyer, choosing instead, at times, to carve out a “higher duty” standard for government lawyers to act in the public interest.<sup>32</sup> Accordingly, it has been argued that public officials are not the same as ordinary citizen-clients because public officials are bestowed with the authority to govern. With this authority comes a duty to act in the best interest of the public, and thus “[i]t follows that . . . [a] government lawyer [is] duty-bound to report internal criminal violations, not to shield them from public exposure.”<sup>33</sup> Closely aligned with this position is a strong belief that, pursuant to the underlying goals of the FOIA, government information should be open and available to the public at large,<sup>34</sup> and that such openness in government protects the people against corruption and waste. Lastly, those who favor restricting the attorney-client privilege in the government setting assert that it is not needed because government officials may always retain private counsel at their own expense.<sup>35</sup> This last argument is short-sighted, however, since most government officials could not afford private legal counsel for what may be nothing more than routine law and policy matters. This approach could also unfairly lead to private attorneys being paid to do the work of a public attorney.

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attorney confidentiality; 2) the court’s ability to apply the privilege to private parties may be a better source of regulation than expanding other government privileges; 3) denying elected officials open discussions about pending litigation with counsel would be detrimental to society as a whole; 4) full and frank disclosure is just as important in the public context as it is in the private context; 5) without the privilege, government may be required to fight with one hand behind its back; and 6) when a municipality has its own staff of lawyers, courts may analogize the privilege as applied to in-house corporate counsel. *Id.*

30. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

31. Salkin, *supra* note 3, at 289; Ellinwood, *supra* note 16, at 1315.

32. *In re Witness Before the Special Grand Jury*, 288 F.3d at 293 (citing *In re Lindsey*, 158 F.3d at 1273); see also MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. (2001) (noting “government lawyers may have higher duty to rectify wrongful official acts despite general rule of confidentiality”).

33. *In re Witness Before the Special Grand Jury*, 288 F.3d at 293 (citing *Nixon*, 418 U.S. at 712-13; *In re Lindsey*, 158 F.3d at 1273).

34. Salkin, *supra* note 3, at 289; see *In re Lindsey*, 158 F.3d at 1274 (citing *In re Sealed Case*, 121 F.3d 729, 749 (D.C. Cir. 1997)).

35. See Salkin, *supra* note 3, at 289.

4. *The Civil/Criminal Distinction of the Government Privilege*.—In recent years, courts around the country have drawn a sharp distinction between the attorney-client privilege as it applies in civil versus criminal matters, and this distinction has featured prominently in recent cases examining the scope of the government attorney-client privilege.<sup>36</sup> In *Jaffee v. Redmond*,<sup>37</sup> the Supreme Court noted that:

if the purpose of the privilege is to be served, the participants in the confidential conversation must be able to predict with some degree of certainty whether particular discussions will be protected; . . . [a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.<sup>38</sup>

Despite this warning, holdings from jurisdictions around the country have left the government attorney-client privilege in an uncertain state,<sup>39</sup> a result the Supreme Court sought to avoid by explicitly stating in *Swidler & Berlin v. United States*<sup>40</sup> that the privilege should not be applied differently in the civil and criminal contexts.<sup>41</sup>

Although the case involved an attorney working in the private setting,<sup>42</sup> it is important to note that the D.C. Circuit's holding in *In re Lindsey*<sup>43</sup> only contained three references to the Supreme Court's holding in *Swidler*, despite the fact that

36. See *id.*; *In re Lindsey*, 158 F.3d at 1278 (holding that government attorneys may not rely on the government attorney-client privilege when it would be used to screen information concerning criminal activities from a grand jury); *infra* notes 101-18 and accompanying text providing a full discussion of *In re Lindsey*; see also *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir. 1997) (holding that “to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets”); *infra* notes 72-100 and accompanying text providing a full discussion of *In re Grand Jury Subpoena Duces Tecum*; *infra* note 103.

37. 518 U.S. 1 (1996).

38. *Id.* at 18 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

39. See Note, *Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel*, 112 HARV. L. REV. 1995, 2006-07 (1999) (regarding the problems with a distinction between civil and criminal cases); see also Goodman & Zabokrtsky, *supra* note 19, at 672-75.

40. 524 U.S. 399 (1988). As part of the investigation of the dismissal of White House Travel Office employees, the independent counsel subpoenaed the handwritten notes taken by Vincent Foster's attorney during a private meeting between the two; nine days after the meeting, Vincent Foster committed suicide. *Id.* The independent counsel argued that the attorney-client privilege ended with Mr. Foster's death because of the possible evidentiary value of the notes in an ongoing criminal investigation. *Id.*

41. *Id.* at 408-09.

42. *Id.* at 401.

43. 158 F.3d 1263 (D.C. Cir. 1998); see *infra* Part II.

*In re Lindsey* was argued only four days later.<sup>44</sup> Conversely, in considering *In re Witness Before the Special Grand Jury*,<sup>45</sup> a case decided in April 2002, the Seventh Circuit did pay more attention to the Supreme Court's holding in *Swidler*, but ultimately refused to accept the argument that the decision compelled the court to find an absolute privilege in the government criminal context simply because there is a government attorney-client privilege in the civil arena.<sup>46</sup> In reaching this conclusion, the court noted that the pedigree of the *Swidler* privilege was much different than the government privilege.<sup>47</sup>

5. *Examining "The Client" in the Government Setting: Disclosure in Recent Senate Confirmation Hearings.*—The fifth factor in Wigmore's analysis, which states that the privilege is assertable "by the client," poses significant challenges for government lawyers seeking to identify exactly who the client is.<sup>48</sup> The recent controversies surrounding President Bush's nominations to the United States Court of Appeals and the United States Supreme Court continue to highlight the uncertainties and ambiguities involved in trying to figure out who the client is in the government setting for purposes of invoking the attorney-client privilege. Although one could argue that these battles have been waged along partisan lines, they have nonetheless exposed a lack of direction and guidance on the application of the attorney-client privilege as it relates to attorneys employed to represent different government entities.<sup>49</sup> The debate over one nominee, Miguel Estrada, whose Court of Appeals nomination was blocked by a Senate filibuster, provided a catalyst for this new discourse,<sup>50</sup> and now provides a useful context in which to discuss the most recent controversy that surrounded the Senate Judiciary Committee's request for the production of memos written by Chief Justice John Roberts during his tenure as the top deputy to Solicitor General Kenneth W. Starr.

At the center of the debate over the confirmation of Miguel Estrada were memoranda that he wrote while working in the Solicitor General's Office of the Department of Justice "on matters such as appeal, certiorari, and amicus

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44. See Pincus, *supra* note 6, at 274.

45. 288 F.3d 289 (7th Cir. 2002); see *infra* notes 119-28 and accompanying text providing a full discussion of the case.

46. Salkin, *supra* note 3, at 290; *In re Witness Before the Special Grand Jury*, 288 F.3d at 292.

47. *In re Witness Before the Special Grand Jury*, 288 F.3d at 292.

48. 8 WIGMORE, *supra* note 6, § 2293, at 554.

49. See David G. Savage, *Privilege Claim May Not Apply to Roberts Papers*, L.A. TIMES, July 29, 2005, at A22; CBS News, *Tussle over Roberts' Documents*, July 26, 2005, available at <http://www.cbsnews.com/stories/2005/07/26/supremecourt/main711851.shtml>; MSNBC, *Bush Won't Release All Roberts Documents*, July 24, 2005, available at <http://www.msnbc.msn.com/id/8689573>.

50. See generally Joshua Panas, Note, *The Miguel Estrada Confirmation Hearings and the Client of a Government Lawyer*, 17 GEO. J. LEGAL ETHICS 541 (2004) (arguing that the confirmation debates have "raised issues of particular importance for the field of professional responsibility").

recommendations.”<sup>51</sup> Although some of Estrada’s opponents argued that the memoranda would “provide . . . evidence of [his] strong conservative convictions,” others “couch[ed their requests] in less political terms” and “argue[d] that such memoranda should be part of the nomination process as useful windows into a candidate’s jurisprudence.”<sup>52</sup> The White House, on the other hand, refused to release the documents, arguing that the documents were protected by the attorney-client privilege.<sup>53</sup>

The White House’s refusal to release the memoranda set off a firestorm of criticism from law makers around the country and resulted in several public pronouncements theorizing on the scope of the government attorney-client privilege.<sup>54</sup> Senator Charles Schumer of New York responded to the White House’s invocation of the attorney-client privilege by asserting that “[Estrada] was not just a lawyer serving a client. He was an employee of the government serving the Constitution. And it’s our job to figure out how he interprets the Constitution.”<sup>55</sup> Many Congressional Democrats followed suit, proclaiming that the client of an attorney working for the federal government is some “amorphous” body such as the “people of the United States.”<sup>56</sup>

In response to these general pronouncements, seven former Solicitors-General, who had served under both Democratic and Republican administrations,<sup>57</sup> wrote a letter to Senator Patrick Leahy of Vermont, Chairman of the Senate Judiciary Committee, to defend the White House’s position with regard to disclosure of the Estrada memoranda, stating in part:

[W]e can attest to the vital importance of candor and confidentiality in the Solicitor General’s decisionmaking process. . . . Our decisionmaking process require[s] the unbridled, open exchange of ideas—an exchange that simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure. Attorneys inevitably will hesitate before giving their honest, independent analysis if their opinions are not safeguarded from future disclosure. High-level decisionmaking requires candor, and candor in turn requires confidentiality.<sup>58</sup>

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51. *Id.*

52. *Id.*

53. *Id.*

54. See Savage, *supra* note 49, at A22; MSNBC, *supra* note 49.

55. Panas, *supra* note 50, at 541-42.

56. *Id.* at 541; MSNBC, *supra* note 49 (claiming that leading Senate Democrats have described the White House’s argument as a “Red Herring”). Some Democrats, however, offered veiled support for the White House’s position, joining Senate Republicans who argued that it would be “unwise to insist on disclosure of memos written by lawyers in the Solicitor General’s Office.” Savage, *supra* note 49, at A22.

57. Signatories included Archibald Cox, who had served under President Kennedy, and Robert H. Bork, who held the post under President Nixon. Savage, *supra* note 49, at A22.

58. Letter from Seth P. Waxman et al., Wilmer, Cutler & Pickering, to Patrick Leahy,

The letter further warned that, "Any attempt to intrude into the Office's highly privileged deliberations would come at a cost of the Solicitor General's ability to defend vigorously the United States' litigation interests—a cost that also would be borne by Congress itself."<sup>59</sup> The authors concluded the letter by asserting that "the confidentiality and integrity of internal deliberations [should not] be sacrificed in the process" of obtaining information on Estrada's views.<sup>60</sup>

The long stalemate that resulted from the White House's refusal to disclose the memos written by Miguel Estrada ultimately contributed to Estrada withdrawing his nomination for the Court of Appeals.<sup>61</sup> The drama that engulfed the Miguel Estrada confirmation hearings was replayed in recent months during the controversy surrounding John G. Roberts, Jr.'s Supreme Court confirmation hearings. Again, the Senate Judiciary Committee demanded the production of memoranda that were written by Roberts during his time as a deputy Solicitor General under Kenneth W. Starr, and again, the White House asserted the attorney-client privilege to prevent disclosure of the documents.<sup>62</sup>

The White House's position with respect to memoranda written by Estrada and Roberts during their time with the Solicitor General's Office attracted fierce criticism. In particular, the White House was criticized for asserting the attorney-client privilege, especially considering that during the "Whitewater" investigations of the Clinton years, Estrada and Roberts' boss, Solicitor General Kenneth Starr, aggressively challenged the notion that White House lawyers who worked for Clinton could invoke the attorney-client privilege; at the time, Starr argued that government lawyers represented the people of the United States, and not the President.<sup>63</sup> Roberts' own views at the time seemed to accord with his boss, having then stated just five years earlier that "[w]hen I served as principle solicitor general, my sole client was the United States."<sup>64</sup>

Unlike with the Estrada disclosure controversy, the dispute surrounding the nomination of John Roberts did not derail his ascent to the Supreme Court. With a Republican controlled Senate firmly in place, the White House was never pushed to disclose the documents that were requested by the Senate Judiciary Committee.<sup>65</sup> In fact, in the days and weeks leading up to Roberts' confirmation,

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Chairman, Senate Comm. on the Judiciary 1 (June 24, 2002), *available at* <http://www.usdoj.gov/olp/solicitorsletter.pdf>.

59. *Id.*

60. *Id.* at 2.

61. Savage, *supra* note 49, at A22.

62. *Id.*

63. *Id.*; see *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915 (8th Cir. 1997); discussion *infra* notes 119-28 and accompanying text.

64. Savage, *supra* note 49, at A22.

65. During the Estrada Confirmation Hearings, the Democrats were "clinging to a narrow majority in the Senate when they said they needed to know more about Estrada's thinking before confirming him." *Id.* Furthermore, the Democrats on the Senate Judiciary Committee said that they would make a "limited and targeted" request for documents on a few of the cases during

the White House appeared keen to avoid any further controversy, and stated, through Attorney General Alberto Gonzales, that all requests for documents from the Senate Judiciary Committee would be considered on a case-by-case basis.<sup>66</sup>

This change in position did not blunt the criticism from leading Senate Democrats, such as John Kerry of Massachusetts and Patrick Leahy of Vermont, who continued to demand disclosure of all the documents in their entirety.<sup>67</sup> After pointing out that other Supreme Court nominees had disclosed such documents in the past, Senator Leahy even went so far as to say, “It’s a total red herring to say ‘Oh, we can’t show this.’ And of course there is no lawyer-client privilege. Those working in the solicitor general’s office are not working for the president. They’re working for you and me and all the American people.”<sup>68</sup> Trying to take a pragmatic approach, Senator John McCain of Arizona “said he thought the documents about work Roberts did in the solicitor general’s office probably could be turned over, but not material when he was one of the lawyers for the first President Bush.”<sup>69</sup> In a statement that summed up the major issue implicated in a narrow interpretation of the government attorney-client privilege, Senator McCain asserted that

If we’re going to set a precedent that those communications between someone who works for the president and the president of the United States are some day going to be made public, I think it could have a real chilling effect on the kind of candor in communications that people would have with the president.<sup>70</sup>

These recent events demonstrate the unfortunate politicization of the government attorney-client privilege. The privilege is too important to be used as a tennis ball lobbed back-and-forth over the net from Democrats to Republicans, depending upon who is in political power. Although the decision from the D.C. Circuit<sup>71</sup> may fuel the firestorm in Washington, D.C., Part II demonstrates that the circuit courts are in conflict, and that the current situation begs for either a final pronouncement from the U.S. Supreme Court, or a statutory approach that would be consistent with the American Bar Association’s Model Rules of Professional Conduct and the rules and codes of attorney professional responsibility that have been adopted by each state.

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Roberts’ time at the solicitor general’s office.” *Id.*

66. MSNBC, *supra* note 49. As Republican Senator Fred D. Thomas of Tennessee put it, “We hope we don’t get into a situation where documents are asked for that folks know will not be forthcoming and we get all hung up on that.” *Id.*

67. *Id.*

68. *Id.* (asserting that the statements were made by Senator Leahy on ABC’s “This Week”).

69. *Id.*

70. *Id.*

71. See *infra* notes 111-18 and accompanying text.

*D. Narrowing the Scope of the Government Attorney-Client Privilege:  
The Decisions Are in*

As the public debate among politicians and pundits played out on television screens and in newspapers across America, courts around the country were already embroiled in the controversy surrounding the scope of the attorney-client privilege in the public sphere, and more specifically whether it existed or could be invoked in the context of a grand jury proceeding.

1. *The Eighth Circuit Court of Appeals.*—The first in a recent string of circuit court decisions struggling with whether or not the attorney-client privilege should be applied in the government context revealed a hostility toward both the general common law privilege and the attorney work product doctrine in the public sector, specifically with respect to the existence of the privilege in the context of a federal grand jury investigation. In *In re Grand Jury Subpoena Duces Tecum*, the Eighth Circuit explicitly held that the attorney-client privilege could not be invoked to prevent the disclosure of certain notes taken by counsel for the White House that concerned an investigation conducted by the Office of Independent Counsel ("OIC").<sup>72</sup>

In June 1996, the OIC, led by Independent Counsel Kenneth W. Starr, directed a grand jury subpoena to be served on the White House requesting the production of "[a]ll documents created during meetings attended by any attorney from the Office of Counsel to the President and Hillary Rodham Clinton (regardless whether any other person was present)" that pertained to the Clintons' "Whitewater" real estate deal.<sup>73</sup> The White House refused to produce the notes, citing the attorney-client privilege and the work product doctrine as justification. While the OIC argued that "recognizing an attorney-client privilege in these circumstances would be tantamount to establishing a new privilege," the White House argued that "the attorney-client privilege is already the best-established of the common-law privileges and that, furthermore, it is an absolute privilege."<sup>74</sup>

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72. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 913 (8th Cir. 1997). The investigation, overseen by Independent Counsel Kenneth W. Starr, focused on matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." *Id.*

73. The documents at issue in this appeal consisted of notes taken by Associate Counsel to the President Miriam Nemetz on July 11, 1995, at a meeting attended by First Lady Hillary Rodham Clinton, Special Counsel to the President Jane Sherburne, and Mrs. Clinton's personal attorney, David Kendall. The subject of the meeting was Mrs. Clinton's activities following the death of Deputy Counsel to the President Vincent W. Foster, Jr. *Id.* at 914. And notes taken by Ms. Sherburne on January 26, 1996, during meetings attended by Mrs. Clinton, Mr. Kendall, and at times, John Quinn, Counsel to the President, which took place during breaks in and immediately following Mrs. Clinton's testimony before a federal grand jury in Washington, D.C., concerning the discovery of certain billing records from the Rose Law Firm in the residence area of the White House. *Id.*

74. *Id.* at 915.

The District Court for the Eastern District of Arkansas, agreed with the White House, and “concluded that because Mrs. Clinton and the White House had a ‘genuine and reasonable (whether or not mistaken)’ belief that the conversations at issue were privileged, the attorney-client privilege applied.”<sup>75</sup> The OIC appealed the district court’s decision, calling upon the Eighth Circuit to decide whether an entity of the federal government may use the attorney-client privilege to avoid complying with a subpoena by a federal grand jury.<sup>76</sup>

The Eighth Circuit began its analysis by asserting that “[w]e need not decide whether a governmental attorney-client privilege exists in other contexts,” and reiterated that its holding would only be applicable where the attorney-client privilege is invoked in the context of a federal grand jury investigation.<sup>77</sup> To aid in its analysis, the court looked to Proposed Federal Rule of Evidence 503<sup>78</sup> and its accompanying commentary as “‘a useful starting place’ for an examination of the federal common law of attorney-client privilege,” but the court quickly concluded that these resources did not speak to the central issue of the case.<sup>79</sup> Next, the court focused on federal and state caselaw precedent cited by the White House in support of the argument that a government attorney-client privilege exists in the context of a federal grand jury investigation.<sup>80</sup> The court examined the cases cited by the White House, but ultimately concluded that their holdings were unpersuasive because none of them actually applied a governmental attorney-client privilege to block a grand-jury investigation.<sup>81</sup> The court next

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75. *Id.* at 914.

76. *Id.* at 915.

77. *Id.*

78. Proposed Federal Rule of Evidence 503, which was not formally adopted, expressly includes governmental entities within the definition of “clients” entitled to assert the privilege and would extend the privilege to all types of government legal consultation. PROPOSED FED. R. EVID. 503(a)(1) (defining “client” as “a person, public officer, corporation, association, or other organization or entity, either public or private”).

79. *In re Grand Jury*, 112 F.3d at 915-16 (quoting *In re Beiter Co.*, 16 F.3d 929, 935 (8th Cir. 1994)) (asserting that the proposed rule and its accompanying commentary “represent only the broad proposition that a governmental body may be a client for purposes of the attorney-client privilege”). The court also looked at other compilations of the general law, such as the Restatement (Third) of the Law Governing Lawyers § 124 (1996) (stating that “[t]he attorney-client privilege extends to a communication of a governmental organization”) and Uniform Rule of Evidence 502 (defining “client” in terms similar to Proposed Federal Rule of Evidence 503), but ultimately concluded that these authorities did not advocate a broad application of the privilege to governmental entities. *Id.* at 916.

80. *Id.* According to the Eighth Circuit, the White House “located only two cases involving a clash between a grand jury and a claim of governmental attorney-client privilege.” *Id.*; *In re Grand Jury Supeonas Duces Tecum* (Faber), 241 N.J. Super. 18, 574 A.2d 449 (N.J. App. Div. 1989); *In re Grand Jury Subpoena* (Doe), 886 F.2d 136 (6th Cir. 1989).

81. *In re Grand Jury*, 112 F.3d at 917 (pointing out that the New Jersey and Sixth Circuit cases cited by the White House were ultimately remanded for further proceedings, and that there were “several significant factual distinctions”).

examined a number of cases, cited by the White House, which held that a governmental attorney-client privilege existed and could be invoked in the context of a civil action. Again, the court found these opinions to be unpersuasive in the context of the present factual scenario.<sup>82</sup>

After the court determined that no "persuasive direction" could be discerned from the caselaw,<sup>83</sup> the court announced that federal common law only recognizes a privilege in "rare situations" and that it should be recognized "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."<sup>84</sup> Furthermore, the court stressed that although the Supreme Court has upheld a broad interpretation of the attorney-client privilege in the past, which extended the privilege to communications between attorneys and lower-level employees possessing relevant information,<sup>85</sup> the court refused to apply this precedent to attorneys representing clients in the public sector after finding that "the private-attorney analogy is inapposite."<sup>86</sup>

Ultimately, the court concluded that "the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials."<sup>87</sup> Furthermore, the court asserted that it would be a "gross misuse of public assets" if the court allowed any part of the government "to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation."<sup>88</sup> In holding that the attorney-client privilege could not be invoked in the context of a federal grand jury investigation, the court stressed that its decision "does not make the duties of government attorneys significantly more difficult,"<sup>89</sup> and admonished that "[a]n official who fears he or she may have

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82. *Id.* at 917-18.

83. *Id.* at 918.

84. *Id.* (internal quotation marks omitted) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

85. *In re Grand Jury*, 112 F.3d at 920-21. In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court did not specifically identify the outer perimeters of the attorney-client privilege, but they did reject the "control group" test as unnecessarily restrictive, and ultimately concluded that if the privilege was to have any value, it should encompass conversations between a corporate attorney and mid- to low-level employees. *Id.* at 396.

86. More specifically, the court asserted that "important differences between the governmental and nongovernmental organizations such as business corporations weigh against the application of the principles of *Upjohn* in this case." *In re Grand Jury*, 112 F.3d at 919-20.

87. *Id.* at 921.

88. *Id.*

89. *Id.* The court explained that

[a]ssuming arguendo that there is a governmental attorney-client privilege in other circumstances, confidentiality will suffer only in those situations that a grand jury might later see fit to investigate. Because agencies and entities of the government are not themselves subject to criminal liability, a government attorney is free to discuss

violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney.”<sup>90</sup>

Before concluding that the White House could not invoke the attorney-client privilege to defeat a grand jury subpoena, the court did consider the assertions advanced by the White House, and then First Lady Hillary Rodham Clinton, that the presence of her private attorney during the meetings should be further grounds to invoke the privilege.<sup>91</sup> The White House relied on the common-interest doctrine,<sup>92</sup> which expands attorney-client privilege in certain situations, but, after finding that there was no common interest between Mrs. Clinton and the White House “either legal, factual, or strategic in character,” the court ultimately rejected this argument as well.<sup>93</sup>

Finally, after finding that the attorney-client privilege could not be invoked to prevent disclosure of certain notes taken by a White House attorney, the Eighth Circuit also held that the work product doctrine could not be used to thwart the grand jury subpoena.<sup>94</sup> In reaching this conclusion, the court focused on the fact that the White House was preparing for a government investigation at the time the notes were taken, not an adversarial proceeding, to support their holding that the notes fell outside the scope of the privilege.<sup>95</sup> The Eighth Circuit made it quite clear that, when government investigations are at issue, the application of the work product privilege is necessarily limited because it is the individual acts of public officials that are being investigated, not the White House itself.<sup>96</sup> Thus, after finding that “no authority allow[s] a client such as the White House to claim work product immunity for materials merely because they were prepared while some other person, such as Mrs. Clinton, was anticipating litigation,” the Court limited the application of the attorney work product privilege with regard to

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anything with a governmental official—except for potential criminal wrongdoing by that official—without fearing later revelation of the conversation.

*Id.*

90. *Id.*

91. *Id.* at 921-22.

92. The Common Interest Doctrine has been described in these terms:

If two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons.

*Id.* at 922 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126(1) (Proposed Final Draft No. 1, 1996)).

93. *Id.* at 922-23 (asserting that the incidental effects on the White House resulting from the OIC investigation are not sufficient to place the governmental institution “in the same canoe as Mrs. Clinton, whose personal liberty is potentially at stake”).

94. *Id.* at 924-25.

95. *Id.* (citing FED. R. CIV. P. 26(b)(3), which states that the work product doctrine limits access to materials “prepared in anticipation of litigation or for trial”).

96. *Id.* (asserting that the work product privilege unreasonably interferes with the conduct of government investigations and grand jury proceedings).

government attorneys representing “non-parties” in federal grand jury investigations.<sup>97</sup>

In deciding whether or not the privilege should extend to attorney work product compiled in anticipation of a federal grand jury proceeding, the court also focused on the nature of the “advice” sought in concluding that the attorney work product privilege did not apply. Even if it could be said that the White House anticipated a congressional investigation at the time the notes were taken, and that a congressional investigation could constitute an adversarial proceeding for the purposes of the attorney work product privilege,<sup>98</sup> the court reasoned that the only harm that could come to the White House as a result of such investigation was political in nature, and that the only advice that could be sought from the government attorney on the matter would necessarily be political in nature as well.<sup>99</sup> Therefore, in refusing to endorse the arguments advanced by the White House in support of the privilege, the court took the position that any advice dealing with “political concerns” falls outside the scope of the work product doctrine.<sup>100</sup>

2. *D.C. Circuit Court of Appeals*.—One year after the Eighth Circuit decided *In re Grand Jury*, the Court of Appeals for the District of Columbia was also called on to examine whether a governmental attorney-client privilege could be invoked in the context of a grand jury proceeding. In *In re Bruce Lindsey*,<sup>101</sup> the D.C. Circuit considered whether or not an attorney in the Office of the President may refuse to respond to a grand jury subpoena seeking information about possible criminal conduct by governmental officials by invoking the attorney-client privilege.<sup>102</sup>

The Office of the President and the OIC offered the same conflicting arguments that guided the Eighth Circuit’s analysis in *In re Grand Jury*, and again, the court began its opinion by stressing that “federal courts do not recognize evidentiary privileges unless doing so ‘promotes sufficiently important interests to outweigh the need for probative evidence.’”<sup>103</sup> The court focused on

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97. *Id.* (citing *In re Cal. Pub. Util. Comm’n*, 892 F.2d 778, 781 (9th Cir. 1989) (concluding that non-party to litigation may not assert work product doctrine)).

98. The court noted that the Restatement seems to include congressional hearings within its definition of anticipated litigation. *Id.* at 924 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 136 (Proposed Final Draft No. 1, 1996), which states that litigation includes “a proceeding such as a grand jury or a coroner’s inquiry or an investigative legislative hearing”).

99. *Id.* at 924-25.

100. This holding reiterated the Eighth Circuit’s disdain toward the invocation of confidentiality privileges by government attorneys and its refusal to apply caselaw involving private parties to cases involving attorneys practicing in the public domain. *See, e.g.*, *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998) (holding that communications and notes involving business advice are within the scope of the attorney work product privilege).

101. 158 F.3d 1263 (D.C. Cir. 1998).

102. *Id.* at 1268.

103. *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

the nature of the governmental attorney-client relationship, and specifically looked to caselaw developed in litigation over exemption five of the Freedom of Information Act (FOIA) as a guide.<sup>104</sup> The Court noted that the exemption “protects, as a general rule, materials which would be protected under the attorney-client privilege,”<sup>105</sup> and that “in the government context the ‘client’ may be the agency and the attorney may be an agency lawyer.”<sup>106</sup> Despite recognition of the existence of the privilege and its insertion into a federal statute, the D.C. Circuit maintained that “[e]xemption five does not itself create a government attorney-client privilege”; it merely ensures that governmental agencies do not lose the traditional protection of evidentiary privileges due to the enactment of FOIA.<sup>107</sup>

After examining caselaw under FOIA, the court turned to the Proposed Federal Rules of Evidence concerning privileges, and stressed that these rules did in fact “recognize[] a place for a government attorney-client privilege.”<sup>108</sup> Furthermore, the court asserted that “[t]he practice of attorneys in the executive branch reflects the common understanding that a government attorney-client privilege functions in at least some contexts.”<sup>109</sup>

Based on the weight of these combined authorities, the D.C. Circuit emphatically concluded that a governmental attorney-client privilege does exist under federal law.<sup>110</sup> After reaching this conclusion, the court was only left to determine whether the Office of the President could invoke it in the context of a grand jury proceeding, an issue of first impression in the D.C. Circuit.<sup>111</sup> The court began by noting that any attorney representing a government official must contend with a number of “competing values,” which typically do not arise for the private practitioner.<sup>112</sup> The Office of the President asserted that the court

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104. *Id.* Under exemption five of FOIA, “‘intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency’ are excused from mandatory disclosure.” *Id.* (quoting Freedom of Information Act, 5 U.S.C. § 552(b)(5) (1994)).

105. *Id.* (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980)).

106. *Id.* (quoting *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997)).

107. *Id.* at 1269. In support of this premise, the court reiterated that “when ‘the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors’ exemption five applies.” *Id.* (quoting *Coastal States*, 617 F.2d at 863).

108. *Id.*

109. *Id.*

110. *Id.* at 1269-70.

111. *Id.* at 1270-72 (explaining that “[a]lthough the cases decided under FOIA recognize a government attorney-client privilege that is rather absolute in civil litigation, those cases do not necessarily control the application of the privilege here”).

112. *Id.* at 1271-72 (“[A]lthough the traditional privilege between attorneys and clients shields private relationships from inquiry in either civil litigation or criminal prosecution, competing values

“should find an *exception* in the grand jury context only if practice and policy require.”<sup>113</sup> Conversely, the Independent Counsel maintained that there was no clear justification for extending the government attorney-client privilege to grand jury proceedings.<sup>114</sup>

Ultimately, the D.C. Circuit sided with the Independent Counsel, and held that the governmental attorney-client privilege could not be invoked to prevent disclosure in a grand jury proceeding.<sup>115</sup> The court asserted that “government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public disclosure.”<sup>116</sup> The court maintained that government attorneys may have an independent obligation to disclose information to further a governmental purpose, and therefore, the loyalty of a governmental lawyer “cannot and must not lie solely with his or her client agency.”<sup>117</sup> Finally, following the lead of the Eighth Circuit, the D.C. Circuit noted that nothing prevents governmental officials from consulting personal counsel in order to ensure that their communications will be kept confidential.<sup>118</sup>

3. *Seventh Circuit Court of Appeals*.—In 2002, the Seventh Circuit stepped into the fray and affirmed a lower court holding that granted the United States’s motion to compel an attorney, employed by the State of Illinois, to testify before a grand jury.<sup>119</sup> In *In re Witness Before the Special Grand Jury*, a state government attorney refused, on the basis of the attorney-client privilege, to give testimony concerning communications between him and a state office holder in contravention of a grand jury subpoena.<sup>120</sup> The District Court for the Northern

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arise when the Office of the President resists demands for information from a federal grand jury and the nation’s chief law enforcement officer.”).

113. *Id.* at 1272.

114. *Id.* The court stressed that these two positions “are not simply semantical: they represent different versions of what is the status quo. To argue about an ‘exception’ presupposes that the privilege otherwise applies in the federal grand jury context; to argue about an ‘extension’ presupposes the opposite.” *Id.*

115. *Id.* Before reaching this conclusion, the court examined whether the common interest doctrine would apply to shield communications between Lindsey and the President while he was acting as an intermediary between the President and his private attorney. *Id.* at 1282. The court ultimately rejected the argument after finding that Lindsey, as a government attorney with overreaching duties, could not invoke an absolute immunity in the face of a grand jury subpoena. *Id.* at 1283.

116. *Id.* at 1272.

117. *Id.* at 1273, 1279 (asserting that such an approach would be “contrary to tradition, common understanding, and our governmental system”).

118. *Id.* at 1276.

119. See *In re Witness Before the Special Grand Jury*, 288 F.3d 289 (7th Cir. 2002). The Attorney was, at the time of the litigation, Counsel to the Governor. The Governor was being investigated for actions in office while he was Secretary of State. The Governor’s current counsel was his counsel when he was Secretary of the State as well. *Id.*

120. *Id.* at 290.

District of Illinois, Eastern Division, rejected his argument and asserted that no such government attorney-client privilege existed in the context of a federal grand jury proceeding, and even if one did exist, it was waived in this case.<sup>121</sup>

The Seventh Circuit started its analysis by pointing out that there was “surprisingly little case law on whether a government agency may also be a client for purposes of this privilege.”<sup>122</sup> Not surprisingly, to support the argument that any privilege that may exist between a government attorney and his client does not extend to criminal proceedings, the United States relied heavily on the recent decisions of the Eighth and D.C. Circuits discussed previously.<sup>123</sup> Naturally, the opposition maintained that those cases were wrongly decided, “insofar as they might apply here to support a distinction between governmental clients and private clients.”<sup>124</sup>

Ultimately, the Seventh Circuit fell into line with the Eighth and D.C. Circuits in finding that public policy does not favor extending the government attorney-client privilege that exists in the context of civil litigation to other contexts, including grand jury proceedings.<sup>125</sup> The court relied on *In re Lindsey* to assert that “government lawyers have a higher, competing duty to act in the public interest.”<sup>126</sup> In a new twist, the court stressed the fact that government lawyers receive their compensation from the public in concluding that “the public lawyer is obligated not to protect his governmental client but to ensure its compliance with the law.”<sup>127</sup> Furthermore, the court rejected any assertions that federalism concerns should afford government attorneys representing state offices and officials a different level of protection than a government attorney representing federal interests.<sup>128</sup>

4. *Second Circuit: A Light in the Tunnel.*—The Second Circuit broke ranks with her sister circuits in 2005 when it decided *In re Grand Jury Investigation (Doe)*,<sup>129</sup> which came down firmly on the side of the “well-established and familiar principle[s]” supporting the attorney-client privilege.<sup>130</sup> This decision involved an appeal from an order of the United States District Court for the

121. *Id.* at 291.

122. *Id.* Here, it should be noted, the parties did stipulate that a government attorney-client privilege exists in the context of civil and regulatory actions. *Id.*

123. *Id.* at 292; *see supra* notes 72-118 and accompanying text.

124. *Id.*

125. *Id.* at 294 (stressing that “reason and experience dictate that the lack of criminal liability for government agencies and the duty of public lawyers to uphold the law and foster an open and accountable government outweigh any need for a privilege in this context”).

126. *Id.* at 293.

127. *Id.*

128. *Id.* at 295 (asserting that “we can see no reason why state government lawyers are so different from federal government lawyers that a different result is justified,” and thus they both “enjoy no immunity from disclosing relevant information to a federal grand jury”).

129. 399 F.3d 527 (2d Cir. 2005).

130. *Id.* at 530; *see* Evan T. Barr, *Second Circuit Says Government Lawyers Covered by Privilege*, 231 N.Y. L.J. 54 (2005).

District of Connecticut compelling the former chief legal counsel to the Office of the Governor of Connecticut to comply with a grand jury subpoena to testify about the contents of confidential conversations she had with former Governor John G. Rowland.<sup>131</sup> In deciding that the government attorney-client privilege is alive (although maybe not well) in the criminal context, the Second Circuit firmly rejected the previously-discussed decisions of three Circuit Courts of Appeal and illuminated a conflict that is now ripe for Supreme Court review.

The Second Circuit began its analysis by pointing out that “[t]he attorney client privilege is one of the oldest recognized privileges for confidential communications’ . . . that for centuries has been a part of our common law.”<sup>132</sup> The court noted that, although the privilege was originally predicated on notions of honesty, loyalty, and fairness that were linked to the barrister’s code of honor as it existed in Elizabethan England, the modern conception of the attorney-client privilege emphasizes its utilitarian value as a tool for promoting justice and fairness in adversarial proceedings.<sup>133</sup> Thus, in examining the privilege as it exists today, the Second Circuit reiterated the fundamental purpose of the privilege as a means of encouraging “full and frank communication between attorneys and their clients . . . thereby promot[ing] broader public interests in the observance of law and the administration of justice.”<sup>134</sup>

Using the common law roots of the attorney-client privilege as the foundation for their analysis, the Second Circuit embraced the notion, rejected in other circuits, that the long-established principles and assumptions underlying the application of the attorney-client privilege in more familiar circumstances should guide the application of the privilege in “new” contexts today.<sup>135</sup> After looking at caselaw that recognizes the existence of a government attorney-client privilege in civil suits<sup>136</sup> and the scope of the Freedom of Information Act litigation,<sup>137</sup> as well as other authorities that restated the common law treatment of the

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131. *In re Grand Jury Investigation (Doe)*, 399 F.3d at 528-30.

132. *Id.* at 530-31 (quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998)).

133. *Id.* at 531.

134. *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

135. *Id.* at 531-32 (stating that a wholesale reassessment of the privilege’s utility is not needed whenever the privilege is invoked under previously unexplored circumstances, and that the “application of the privilege in ‘new’ contexts remains informed by the long-standing principles and assumptions that underlie its application in more familiar territory”). *Contra In re Witness Before the Special Grand Jury*, 288 F.3d 289 (7th Cir. 2002); *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

136. *In re Grand Jury Investigation (Doe)*, 399 F.3d at 532; *see, e.g., Galarza v. United States*, 179 F.R.D. 291, 295 (S.D. Cal. 1998); *Dep’t of Econ. Dev. v. Arthur Andersen & Co.*, 139 F.R.D. 295, 300 (S.D.N.Y. 1991); *Detroit Screwmatic Co. v. United States*, 49 F.R.D. 77, 78 (S.D.N.Y. 1970); *United States v. Anderson*, 34 F.R.D. 518, 522-23 (D. Colo. 1963).

137. *In re Grand Jury Investigation (Doe)*, 399 F.3d at 533; *see, e.g., Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980); *Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977).

government attorney-client relationship,<sup>138</sup> the Second Circuit concluded that there was “substantial authority for the view that the rationale supporting the attorney-client privilege applicable to private entities has general relevance to government entities as well.”<sup>139</sup>

After finding that the common law generally assumes the existence of a government attorney-client privilege, the Second Circuit refused to adopt the rationale, advanced by the Seventh, Eighth, and D.C. Circuits, that the government attorney-client privilege is necessarily weaker or must give way when a federal grand jury demands “otherwise privileged statements in order to further a criminal investigation.”<sup>140</sup> The Second Circuit rejected any presumption that the public’s interest is exclusively served through the furtherance of the grand jury’s “truth-seeking” function, and refused to accept the government’s argument that upholding the attorney-client privilege in these circumstances would constitute a “gross misuse of public assets.”<sup>141</sup> The court asserted that it was also in the public’s interest for public officials “to receive and act upon the best possible legal advice,” and made note of a Connecticut statute which explicitly protects the government-attorney-client privilege for this purpose to dispel any notions to the contrary.<sup>142</sup>

Thus, in finding that the public interest is promoted through full and frank communication between the public official and government attorney, and that it is best protected through a robust interpretation of the attorney-client privilege in the government context, the Second Circuit sought to enshrine the principles that underlie the attorney-client privilege and defy a growing trend which “assumes that the ‘public interest’ in disclosure is readily apparent, and that a public official’s willingness to consult will be only ‘marginally’ affected by the

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138. *In re Grand Jury Investigation (Doe)*, 399 F.3d at 532. The Second Circuit looked to several sources for “general guidance regarding federal common law principles.” *Id.* In examining Proposed Federal Rule of Evidence 503, treatises written by legal scholars, and applicable caselaw examining the nature of the government attorney-client privilege, the Second Circuit noted that “serious legal thinkers, applying ‘reason and experience,’ have considered the privilege’s protections applicable in the government context.” *Id.*

139. *Id.* at 533.

140. *Id.* (refusing to abandon the attorney-client privilege in a context in which its protections are arguably needed most); Barr, *supra* note 130 (stating that the court was reluctant to entertain any “notion that the privilege should be curtailed in another particular category of cases, such as those involving potential criminal charges”).

141. *In re Grand Jury Investigation (Doe)*, 399 F.3d at 534 (quoting *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir. 1997)).

142. *Id.* In assessing this public interest component, the Second Circuit relied on a statute passed by the Connecticut Legislature which specifically provided that: “[i]n any civil or criminal case or proceeding . . . all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure.” CONN. GEN. STAT. § 52-146r(b) (2005).

abrogation of the privilege in the face of a grand jury subpoena.”<sup>143</sup>

*E. Possible Explanations for the Disparate Treatment*

The Second Circuit’s holding in *Doe* was a drastic, but welcome, departure from the “majority view” that had developed in other circuits in recent years.<sup>144</sup> There are several possible explanations for this change. First, and most importantly, the Second Circuit began its analysis with an assumption that there was a government attorney-client privilege, “and that any exceptions to the general rule should be narrowly construed.”<sup>145</sup> This approach is in stark contrast to that adopted by the Seventh, Eighth, and D.C. Circuits, which began their analyses with a proclamation that a government attorney-client privilege does not exist in the context of a grand jury investigation, thus making the issue whether a “new privilege” should be established, not whether there was an exception to the general rule.<sup>146</sup> By starting off with an assumption that the privilege should apply, and then looking to see if there should be an exception in the context of a grand jury investigation, the Second Circuit “shifted the odds in favor of the putative privilege holder,”<sup>147</sup> making it easier for the court to conclude that the government attorney-client privilege should prevent disclosure.

Although it could be said that the analytical approach taken by the Second Circuit set the stage for its ultimate holding in support of the government attorney-client privilege, there are several other possible explanations. Some have argued that the Second Circuit rejected the analysis of the Eighth and D.C. Circuits because those decisions were “perceived as a byproduct of prosecutorial overreaching” by the Office of the Independent Counsel.<sup>148</sup> Others have pointed to the federalism issues presented in the Second Circuit case, citing the fact that the Connecticut Legislature “had specifically recognized the existence of a privilege for government lawyers in both civil and criminal proceedings” in order to explain the disparate outcome.<sup>149</sup> Finally, some have even suggested that the Second Circuit’s decision merely “reflect[s] today’s greater sensitivity to the perils of potential white collar criminal exposure in the post-Enron, Sarbanes-

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143. *In re Grand Jury Investigation (Doe)*, 399 F.3d at 533, 536.

144. See Barr, *supra* note 130; *In re Grand Jury Investigation (Doe)*, 399 F.3d at 536 n.4 (acknowledging that “[the] decision is in conflict with the Seventh Circuit’s decision in *Ryan*, and is in sharp tension with the decision of the Eighth (*Grand Jury*) and the D.C. Circuits (*Lindsey*),” but asserting that “[they] are in no position, however, to resolve this tension in the law” (citations omitted)).

145. Barr, *supra* note 130; *In re Grand Jury Investigation (Doe)*, 399 F.3d at 531.

146. See *In re Witness Before the Special Grand Jury*, 288 F.3d 289 (7th Cir. 2002); *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

147. Barr, *supra* note 130.

148. *Id.*

149. *Id.*

Oxley world.”<sup>150</sup>

In addition, the government attorney in *Doe* asserted that she provided legal advice to the “Office of the Governor” as opposed to specifically identifying Governor Rowland, as an individual, as her client.<sup>151</sup> This tactical characterization may have answered the concerns in previous opinions discussing whether the client of the government lawyer for purposes of the privilege was an office or entity as opposed to an individual official.

#### *F. Analysis of Conflicting Positions: Who is Correct?*

*1. Search for Controlling Caselaw.*—Despite the fact that the attorney-client privilege is one of the oldest and most firmly-rooted privileges recognized by the common law, the Eighth Circuit concluded that the privilege is not necessarily applicable to disputes involving federal government entities.<sup>152</sup> In reaching this conclusion, the court relied upon the lack of caselaw applying the attorney-client privilege in the context of a federal grand jury proceeding.<sup>153</sup> Thus, the court accepted the argument advanced by the Office of the Independent Counsel (“OIC”), asserting that the recognition of the privilege in such a context would be equivalent to “establishing a new privilege, which courts ordinarily undertake with great reluctance.”<sup>154</sup>

This reasoning is problematic for two reasons. First, as the White House pointed out in its brief to the Eighth Circuit, the lack of caselaw precedent on this issue is expected given the fact that disputes such as this are very rare and “ordinarily could not arise except in the context of an OIC investigation.”<sup>155</sup> Normally, a federal prosecutor’s request for confidential governmental communications could be resolved quietly through intra-branch discussion and not subpoenas, but because the OIC is not part of the executive branch this method is not available in these situations.<sup>156</sup> Despite the fact that a government entity must respond to an OIC subpoena in a different manner than it would normally respond to another federal prosecutor’s request, “it does not follow that the attorney-client privilege cannot be asserted by the entity receiving the request.”<sup>157</sup> As the White House argued in its brief to the court, the unique

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150. *Id.*

151. *See In re Grand Jury Investigation (Doe)*, 399 F.3d 527, 533 (2d Cir. 2005).

152. *In re Grand Jury Subpoena Dues Tecum*, 112 F.3d 910, 915 (8th Cir. 1997).

153. *Id.* at 915; *see Kendall*, *supra* note 7, at 429.

154. *In re Grand Jury*, 112 F.3d at 915; *see also Kendall*, *supra* note 7, at 429 (citing Appellant’s Opening Brief at 9-11, 21-24, *In re Grand Jury*, 112 F.3d 910 (No. 96-4108)).

155. *Kendall*, *supra* note 7, at 429 (quoting Appellee’s Brief at 36, *In re Grand Jury*, 112 F.3d 910 (No. 96-4108)).

156. *Kendall*, *supra* note 7, at 429; *see MSNBC*, *supra* note 49 (discussing the disclosure controversy surrounding Supreme Court nominee Roberts and stating that, “There is often an accommodation that is reached with respect to requests for information, and I suspect that is going to happen in this case”).

157. *Kendall*, *supra* note 7, at 429.

situations created by an OIC subpoena, "can hardly mean that the privilege claimed is not well-recognized by federal courts under Rule 501 or that the privileges that otherwise exist now evaporate."<sup>158</sup>

The Eighth Circuit's narrow search for controlling caselaw is also flawed by its misguided belief that a government entity's ability to assert the attorney-client privilege depends upon the nature of the case.<sup>159</sup> As the White House argued in its brief to the court, "no court has ever held that the same attorney-client communication is privileged in some litigation settings but not others, for some corporate transactions but not others, in some criminal investigations, but not others."<sup>160</sup> Furthermore, the Supreme Court has explicitly rejected the notion that the attorney-client privilege should be applied differently in different situations, and asserted that the attorney-client privilege would be eroded by uncertainty if this approach were adopted.<sup>161</sup> The purposes underlying the privilege would be undermined, leaving government officials skeptical and unwilling to "disclose information to government attorneys for fear that they would later become involved in a grand jury proceeding where the attorney-client privilege" would not be available to prevent their disclosure.<sup>162</sup> As the Supreme Court asserted in cases preceding this decision, such a privilege "is little better than no privilege at all."<sup>163</sup>

2. *Federal Common Law*.—After finding that no caselaw precedent supported the White House's assertion that the attorney-client privilege should apply in federal grand jury criminal investigations, the Eighth Circuit refused to recognize or extend the attorney-client privilege to disputes involving federal government entities accused of criminal wrongdoing. This holding, however, disregards the principles of common law that have guided the application of the attorney-client privilege in this country for decades, and, more importantly, recent Supreme Court holdings that have illustrated the Court's reluctance to dilute the attorney-client privilege.<sup>164</sup> Indeed, even the D.C. Circuit, a court that has sought

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158. *Id.* (quoting Appellee's Brief, *supra* note 155, at 37).

159. *Id.* at 430.

160. *Id.* (quoting Appellee's Brief, *supra* note 155, at 32).

161. *See Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

162. *Kendall*, *supra* note 7, at 430; *see Upjohn Co.*, 449 U.S. at 393, 397.

163. *Upjohn Co.*, 449 U.S. at 393.

164. *See, e.g., Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (rejecting a balancing approach and embracing a broad concept of privilege that survives the client's death and holding that client confidences that can be described as tangentially related to the legal advice provided in the course of communications are worthy of protection); *United States v. Zolin*, 491 U.S. 554 (1985) (recognizing that the attorney-client privilege promotes important societal interests and that *in camera* review can be utilized to promote this purpose, but also recognizing an important limitation on privilege by asserting that it cannot be applied where policy reasons for recognizing privilege are not present, such as where the communication is made for the purposes of furthering wrongdoing); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (asserting that the privilege promotes full and frank communications between attorneys and their clients, encourages observance of the law, and aids in the administration of justice, and holding that the

to limit the scope of the government attorney-client privilege, recognized that it could not dispute the existence of a general, common law attorney-client privilege in the public sphere.<sup>165</sup> Clearly, the federal common law, embodied in Proposed Rule of Evidence 503, supports the notion that the government is a client for purposes of the attorney-client privilege,<sup>166</sup> and the concept that the attorney-client privilege is available to all clients, regardless of whether they are involved in criminal or civil proceedings.<sup>167</sup> Thus, one cannot escape the conclusion that the Eighth Circuit's conception of the privilege is baseless. The court should refuse to extend the privilege to the government during federal criminal investigations because, according to Proposed Rule 503, the government is already well within its rights to assert the privilege without exception.<sup>168</sup>

3. *Purpose of Privilege.*—As discussed earlier, the attorney-client privilege is a means of encouraging full and frank communication between the attorney and the client, and facilitating the full development of facts necessary for competent legal representation.<sup>169</sup> The attorney-client privilege also serves to encourage clients to seek legal advice early on and thus promotes societal interests,

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trustee of a corporation in bankruptcy can waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications); *Upjohn Co.*, 499 U.S. at 383 (asserting that confidentiality is essential if the societal interests of fostering compliance with the law is to be served and holding that the privilege extends to conversations between corporate attorney and employees beyond the corporation's "control group").

165. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (holding that, despite the existence of a common law attorney-client privilege that is applicable to government entities, the privilege could not be asserted to prevent the disclosure of communications pursuant to a federal grand jury subpoena).

166. See PROPOSED FED. R. EVID. 503, advisory committee notes; *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 926 (8th Cir. 1997) (Kopf, J., dissenting) (taking issue with the majority's refusal to acknowledge that a governmental attorney-client privilege existed, calling it a "well-recognized principle" that the government is entitled to claim both the attorney-client and work product privileges); see also *Green v. IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982) (holding that the "[attorney-client privilege] also unquestionably is applicable to the relationship between Government attorneys and administrative personnel"); *Hearn v. Rhay*, 68 F.R.D. 574, 579 (E.D. Wash. 1975) ("Federal courts have uniformly held that the attorney-client privilege can arise with respect to attorneys representing a state."); *United States v. Alu*, 246 F.2d 29, 33-34 (2d Cir. 1957) ("It has been widely recognized that lawyers representing litigants should not be called as witnesses in trials involving those litigants if such testimony can be avoided consonant with . . . justice. We believe that this prohibition is applicable to the United States Government and its attorneys as well as to private litigants and their attorneys.").

167. See PROPOSED FED. R. EVID. 503; *In re Grand Jury*, 112 F.3d at 926 (Kopf, J., dissenting) (arguing that there is no precedent for holding that the privilege did not apply because a criminal investigation was ongoing).

168. *Kendall*, *supra* note 7, at 431 (pointing out that the Eighth Circuit disregarded the District Court's findings that there was "no 'authority specifically holding that a federal governmental attorney-client privilege may not be asserted in such a situation'" (citation omitted)).

169. See *Upjohn*, 449 U.S. at 389; see also *Kendall*, *supra* note 7, at 431-32.

specifically the “broader public interests in the observance of law and administration of justice.”<sup>170</sup> These principles, however, have been undermined by the Seventh, Eighth, and D.C. Circuit Court decisions that have sought to limit the scope of the attorney-client privilege as it applies to government entities.

Public officials will be deterred from seeking legal advice from government attorneys, let alone early legal advice, if they believe that their communications could be revealed in later judicial proceedings.<sup>171</sup> This lack of communication could have significant repercussions. Besides the obvious blow to attorneys employed in the public sector,<sup>172</sup> the overall functioning of government may be impaired because of the reluctance of government officials to seek legal advice. The lack of communication could result in policies that may not be on firm legal ground, conduct that could unknowingly lead to violations of the law, and an increased number of investigations.<sup>173</sup> Aside from the devastating impact that this could have on the public’s perception of government as a whole, law makers may have a hard time pursuing new policies to regain the public’s confidence if they are forced to expend large amounts of time and resources remedying the wrongdoing of past officials.<sup>174</sup>

4. *Uncertainty*.—Probably the most harmful and overlooked aspect of the recent circuit court decisions is the uncertainty that it has injected into the application of the attorney-client privilege across the country. As the Supreme Court has pointed out, “how can a client, or even an attorney for that matter, know what may become relevant to a criminal investigation in the future?”<sup>175</sup> This element of uncertainty is precisely the kind of pitfall that the Supreme Court has repeatedly cautioned against in its attorney-client privilege jurisprudence.<sup>176</sup> Even attorneys and clients in the Second Circuit should be leery about feeling too confident regarding the privilege since the conflict in the circuits presents an opportunity for the Supreme Court to grant certiorari in the future to address the discrepancy.

5. *Existing Checks on Abuse*.—In asserting that the Second Circuit provided a more sound analysis of the issue, and ultimately reached a better conclusion, at

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170. Kendall, *supra* note 7, at 532 (quoting *Upjohn*, 449 U.S. at 389). In *Upjohn*, 449 U.S. at 389, the Supreme Court asserted that this public interest is advanced by “sound legal advice or advocacy . . . and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”

171. See Kendall, *supra* note 7, at 433.

172. Some have suggested that this will lead to government attorneys becoming totally obsolete. See *id.* at 430.

173. See *id.*

174. See *id.* at 435.

175. Radson & Waratuke, *supra* note 6, at 819.

176. *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (stating that “[a]n uncertain privilege . . . is little better than no privilege at all” (quoting *Upjohn*, 449 U.S. at 393)); see also *Upjohn*, 449 U.S. at 393 (holding that the effectiveness of the attorney-client privilege would be greatly diminished if its existence was contingent on a judge’s determination of the importance of the protected information).

least one commentator has argued that there is no need to ignore the plain evidence which points toward the existence of a robust attorney-client privilege in the public sphere that is adaptable to new and unforeseen contexts because there are existing checks on abuse that will keep government lawyers from using the privilege as a shield to hide official misconduct or wrongdoing.<sup>177</sup> To ensure that the “‘seal of secrecy . . . between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or a crime,’”<sup>178</sup> the Supreme Court has repeatedly recognized a crime-fraud exception that will prevent the use of the attorney-client privilege to protect communications that further an improper purpose or hinder the administration of justice.<sup>179</sup> “The crime-fraud exception protects against the most egregious” abuses of the attorney-client privilege, specifically when a client seeks legal advice in order to further a crime or perpetuate a fraud.<sup>180</sup> Because “it is the intent and actions of the client that determine whether or not the [crime-fraud] exception applies” to a given communication, the fact that “the attorney is completely innocent and unaware of the client’s wrongdoing” is of little consequence.<sup>181</sup>

In recent years the Supreme Court has removed significant procedural obstacles to the crime-fraud exception, making it easier for parties to inquire as to whether or not the exception applies to specific communications.<sup>182</sup> At the same time, the Supreme Court has maintained the important safeguard of judicial review *in camera* to ensure confidentiality when challenges fail.<sup>183</sup> This

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177. Barr, *supra* note 130 (supporting his conclusion by asserting that “[t]he notion that government lawyers must answer to the public at large sounds idealistic but ignores the fact that many of the legal issues confronted by an officeholder are not necessarily black and white”).

178. Lance Cole, *Revoking Our Privileges: Federal Law Enforcement’s Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469, 500 (2003) (quoting *United States v. Zolin*, 491 U.S. 554, 563 (1989) (internal quotation marks omitted)); see also *Clark v. United States*, 289 U.S. 1, 15 (1933).

179. See Cole, *supra* note 178, at 500.

180. *Id.*; *Zolin*, 491 U.S. at 569; *Clark*, 289 U.S. at 15. The exception has received a similar treatment in lower courts. See, e.g., *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) (holding that the attorney-client privilege could not prevent disclosure of communications made to a lawyer involving future criminal purpose); *In re Impounded*, 241 F.3d 308 (3d Cir. 2001) (asserting that the attorney-client privilege is waived when an attorney is consulted for the purpose of furthering a crime or fraud); *Alexander v. FBI*, 198 F.R.D. 306, 310 (D.C. Cir. 2000) (listing the requirements for the crime fraud exception); *In re Grand Jury Proceedings (Company X)*, 857 F.2d 710, 712 (10th Cir. 1988) (holding that “[t]he attorney-client privilege does not apply where the client consults an attorney to further a crime or fraud”).

181. Cole, *supra* note 178, at 501.

182. *Id.* at 505; *Zolin*, 491 U.S. at 573 (adopting a reasonable belief standard for obtaining *in camera* review of alleged privileged communications and rejecting the “independent evidence rule” after concluding that “evidence directly but incompletely reflecting the content of the contested communications” could be used by a court in determining whether or not *in camera* review would be appropriate).

183. Cole, *supra* note 178, at 505; *Zolin*, 491 U.S. at 573.

pragmatic approach permits “government officials to obtain judicial review of improper assertions of privilege” with ease and also allows law enforcement officials “to overcome wrongful assertions of the privilege on a case-by-case basis.”<sup>184</sup>

The crime-fraud exception is an effective check on any potential abuse of the attorney-client privilege, and therefore, one may question the rationale adopted in circuit court opinions that sought to limit the government attorney-client privilege in the context of grand jury investigations. As one commentator put it, “In those (presumably rare) cases in which an officeholder uses the services of a government lawyer to commit crimes, the well-established crime-fraud exception to the privilege is already available to ferret out wrongdoing.”<sup>185</sup>

In addition to the widely recognized crime-fraud exception, the law of waiver also provides an effective check on abuse where the privilege is invoked in the context of criminal proceedings. One commentator notes, “[G]iven that the privilege belongs to the office as opposed to a particular individual, the possibility of waiver by a successor (who may belong to a different political party) should deter a politician bent on breaking the law from relying on government lawyers to do so.”<sup>186</sup>

Furthermore, the common interest doctrine, as a matter of policy, has been trumpeted as a means of encouraging public officials to “turn to government counsel who may be able to bring institutional knowledge and expertise to bear in rendering advice on an issue involving federal or state law, without the official having to worry about potential disclosure at some later point.”<sup>187</sup>

6. *Balancing Competing Interests/Open Meeting Laws.*—The attorney work product doctrine and the attorney-client privilege may be limited by open meeting laws, or “sunshine laws,” that prevent governing bodies from meeting in private.<sup>188</sup> In general, because the governing body must meet in the open, and confidential communications with a government attorney cannot be shared in a public meeting, one of the elements necessary to establish the privilege is lacking.<sup>189</sup> However, despite this general rule, states throughout the country have recognized an independent basis for the attorney-client privilege, typically by invoking the strong public policy considerations that generally apply to private clients. For example, in many states, public bodies are authorized by statute to move into executive session for, among other reasons, obtaining legal advice from their attorney.<sup>190</sup> This allows for a private and confidential conversation away from the public.

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184. Cole, *supra* note 178, at 507-08.

185. Barr, *supra* note 130; Cole, *supra* note 178, at 507 (arguing that absent some evidence that the crime-fraud exception is not adequate to protect against abuse of the system, law enforcement officials should rely upon it to prevent abuse of the privilege on a case-by-case basis).

186. Barr, *supra* note 130.

187. *Id.*

188. See Radson & Waratuke, *supra* note 6, at 813.

189. *Id.*

190. See, e.g., N.Y. PUB. OFF. LAW § 105(1)(d) (McKinney 2005).

One of the most frequently cited cases that reconcile the demands of an open meeting law with the application of the privilege is *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*.<sup>191</sup> In this case, the court weighed different competing public policy objectives and concluded that the lack of any legislative intent to override the attorney-client privilege made it possible for the privilege to operate concurrently with the state's open meeting laws.<sup>192</sup> In reaching this conclusion, the court stressed that "[g]overnment should have no advantage in legal strife; neither should it be a second-class citizen. . . . 'Public agencies face the same hard realities as other civil litigants. . . . An attorney that cannot confer with his client outside his opponent's presence may be under insurmountable handicaps.'"<sup>193</sup>

Courts throughout the country have taken an approach similar to that adopted in the California courts. The Supreme Court of Alabama, for example, after noting the "inherent, continuing, and plenary powers the judiciary has over its attorneys as officers of the court,"<sup>194</sup> balanced the competing interests at stake and concluded that an attorney's ability to fulfill his duties and obligations to his client were not affected by the state's sunshine law.<sup>195</sup> Similarly, a Texas appellate court asserted that the attorney-client privilege remained unchanged and protected despite the state's adoption of an open meeting law.<sup>196</sup> In holding that the attorney-client privilege protects conversations that take place when a governing body meets privately with its attorney, as permitted by the statute, to discuss pending or contemplated litigation, the court stressed that "a governmental body has as much right as an individual to consult with its attorney without risking the disclosure of important confidential information."<sup>197</sup>

In addition to California, Alabama, and Texas, courts in West Virginia, Minnesota, Alaska, and Iowa recognize the continued existence of a robust attorney-client privilege despite the passage of open meeting laws in their respective jurisdictions.<sup>198</sup> However, it should be noted that some jurisdictions

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191. 69 Cal. Rptr. 480, 492 (Ct. App. 1968) (holding that California's Open Meeting law operated concurrently with California's Evidence Code), *superseded by statute as stated in* *McComas v. Bd. of Educ.*, 475 S.E.2d 280 (W. Va. 1996); *see Radson & Waratuke, supra* note 6, at 813.

192. *Sacramento Newspaper Guild*, 69 Cal. Rptr. at 490; *see also* *Oklahoma Assoc. of Mun. Att'ys v. State*, 577 P.2d 1310 (Okla. 1970) (similarly finding that the legislature did not intend to abrogate the attorney-client privilege in enacting the Open Meetings Act).

193. *Sacramento Newspaper Guild*, 69 Cal. Rptr. at 490 (quoting *Sacramento Newspaper Guild v. Sacramento Co. Bd. of Supervisors*, 62 Cal. Rptr. 819, 821 (Ct. App. 1967)) (internal quotation marks omitted); *see Radson & Waratuke, supra* note 6, at 814.

194. *Radson & Waratuke, supra* note 6, at 815 (quoting *Dunn v. Ala. State Univ. Bd. of Tr.*, 628 So. 2d 519, 529-30 (Ala. 1993)).

195. *Dunn*, 628 So. 2d at 530.

196. *Markowski v. City of Marlin*, 940 S.W.2d 720, 725 (Tex. Ct. App. 1997).

197. *Id.* at 726-27 (asserting that "logic dictates" that the conversations that took place at that meeting should be protected).

198. *Radson & Waratuke, supra* note 6, at 815.

such as Florida, Arkansas, and Nevada, have adhered to the opposite approach by rejecting any notion that there is an implied attorney-client privilege exception to their states' open meeting laws.<sup>199</sup> For example, in *Neu v. Miami Herald Publishing Co.*,<sup>200</sup> the Florida Supreme Court emphatically stated that the state's evidence code and the rules of professional conduct did not create an exception to the state's sunshine law that would protect conversations between a government attorney and his client.<sup>201</sup> Although the court acknowledged that its holding would create an unfair advantage to those who challenge the government in adversarial proceedings, they ultimately concluded that it was the legislature's duty to create such an exception.<sup>202</sup> Although this holding had a profound impact, leading many to believe that there was little to no attorney-client privilege left in the government context in the State of Florida, the court made a point to stress that its decision did not eliminate the privilege; it merely recognized that the state's open meeting law prevented governing bodies from meeting in private and, thus, having confidential conversations that would otherwise be protected by the privilege.<sup>203</sup>

With respect to the attorney work product doctrine, states that have adopted public record acts have run into many of the same issues that are raised by the inherent conflict between open meeting acts and the attorney-client privilege in the government sphere. In enacting the federal counterpart to state public record acts, the Freedom of Information Act, Congress sought to harmonize the conflicting interests of open government and accountability on the one hand and a client's right to confidentiality on the other.<sup>204</sup> Pursuant to its terms, FOIA mandates that all agency records are subject to disclosure upon demand except for records that fall under one of the enumerated statutory exemptions.<sup>205</sup> As noted by the Eighth Circuit in *In re Grand Jury*,<sup>206</sup> exemption five protects "inter-

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199. *Id.*; see, e.g., *McKay v. Bd. of County Comm'rs of Douglas County*, 746 P.2d 124, 128 (Nev. 1987) (asserting that the open meeting law affects communications with a client to the extent that the client is meeting as a governing body); *Laman v. McCord*, 432 S.W.2d 753, 754 (Ark. 1968) (holding that a city council could not meet privately with their attorney after the passage of FOIA).

200. 462 So. 2d 821 (Fla.), *superseded by statute as stated by City of Melbourne v. A.T.S. Melbourne, Inc.*, 475 So. 2d 270, 271 (Fla. Dist. Ct. App. 1985).

201. *Id.* at 823.

202. *Radson & Waratuke*, *supra* note 6, at 809-10. The Florida State legislature accepted this invitation and ultimately created an exemption to the sunshine law for what came to be known as "shade sessions." *Id.* Specifically Section 286.011(8) of the Florida Code permits a "board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity" to meet privately with its attorney to discuss "pending litigation to which the entity is presently a party." FLA. STAT. § 286.011(8) (2005).

203. *Radson & Waratuke*, *supra* note 6, at 810.

204. See *id.* at 834.

205. See *id.*; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975).

206. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency” from public disclosure.<sup>207</sup> Federal courts, including the United States Supreme Court, in interpreting exemption five have maintained that it protects documents that are not discoverable by a private party enthralled in litigation with a government agency.<sup>208</sup> Thus, with respect to a government attorney operating in the private sphere, exemption five protects “‘working papers of the agency attorney and documents which would come within the attorney-client privilege if [it] applied to public parties.’”<sup>209</sup> By reconciling the mandate of FOIA with the need for attorney-client confidentiality in the public sphere, the federal government recognized that “‘frank discussion of legal or policy matters’ in writing might be inhibited if the discussion were made public; and the ‘decisions’ and ‘policies formulated’ would be the poorer as a result.”<sup>210</sup>

## II. PROFESSIONAL RESPONSIBILITY RULES MANDATE CONFIDENTIALITY

The focus on the government attorney-client confidentiality issue by the courts has centered on the privilege of confidentiality rooted in the common law of evidence. However, a review of codes of conduct or rules of professionalism that govern lawyers further demands that conversations between attorneys and their clients remain confidential.

### A. American Bar Association

While the United States has long recognized that government attorneys are entitled to protection under the same common law privileges that are afforded to private practitioners, the exact scope of these privileges for attorneys representing clients in the public sphere remains marred in controversy. The American Bar Association (“ABA”), in adopting model rules of professional conduct, has shed some light on this dilemma by setting a standard for professional responsibility that is intended to guide the practice of attorneys operating in both the public and private sectors.<sup>211</sup> As recently as 2005, the ABA spoke out in support of a robust attorney-client privilege, asserting that the privilege is a key foundational concept

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207. 5 U.S.C. § 552(b)(5) (2000); Radson & Waratuke, *supra* note 6, at 834.

208. See Radson & Waratuke, *supra* note 6, at 834; see, e.g., *Sears, Roebuck & Co.*, 421 U.S. at 148-49; *EPA v. Mink*, 410 U.S. 73, 85-86 (1973), *superseded by statute as stated in Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975).

209. Radson & Waratuke, *supra* note 6, at 834; see *Sears, Roebuck & Co.*, 421 U.S. at 154.

210. *Sears, Roebuck & Co.*, 421 U.S. at 150 (holding that the government would be hampered if a contrary approach was adopted because government agencies would be forced to operate in a fish bowl); see Radson & Waratuke, *supra* note 6, at 834; see also *Mink*, 410 U.S. at 87.

211. Radack, *supra* note 17, at 125 (explaining that the ABA originally adhered to an approach that “forbade lawyers from revealing confidential information acquired during the course of representing a client, which could include the attorney’s supervisor in the department or agency, the agency itself, the statutory mission of the agency, the entire government of which that agency is part, and the public interest”); see MODEL RULES OF PROF’L CONDUCT (2002).

of every attorney-client relationship.<sup>212</sup> In accordance with this stance, the ABA has relied on common law precedent and the support of experts in the field of legal ethics, to protect and promote the attorney-client privilege of confidentiality through rules that will guide the practice of all attorneys in the years to come.<sup>213</sup>

The ABA first codified regulations for the conduct of lawyers in the United States at its annual meeting in 1908 when it adopted the *Canons of Professional Ethics* ("Canons").<sup>214</sup> In adopting the Canons, the ABA declared that a lawyer has "[t]he duty to preserve his client's confidences"<sup>215</sup> and that "the stability of the Courts and of all departments of government rests upon the approval of the people."<sup>216</sup> In recognizing the people's right to invoke a privilege of confidentiality, the ABA also recognized that there was potential for abuse. Thus, in adopting the Canons, the ABA excluded conversations and communications from the definition of "confidences," leaving them outside the scope of the recognized privilege.<sup>217</sup> Despite this exclusion, attorneys were given a great deal of discretion to determine whether their client's behavior warranted disclosure under the future crime exception, while Canon 41 also gave attorneys wide discretion when faced with client fraud or deception.<sup>218</sup>

In 1969, the ABA abandoned the Canons, and adopted the *Model Code of*

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212. In their report to the ABA House of Delegates, the ABA Task Force on Attorney-Client Privilege recommended that the ABA adopt a resolution expressing its strong support for the preservation for the attorney-client privilege and work product doctrine, and its opposition to policies, practices, and procedures of governmental agencies that have eroded the attorney-client privilege and work product doctrine. ABA TASK FORCE ON ATTORNEY CLIENT PRIVILEGE REPORT TO THE HOUSE OF DELEGATES, EXECUTIVE SUMMARY (2005), available at <http://www.abanet.org/buslaw/attorneyclient/home.shtml>. Specifically, Recommendation 111 states:

[T]he American Bar Association strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with the law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice . . . .

ABA TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE, RECOMMENDATION 111 (2005), available at [http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation\\_adopted.pdf](http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf).

213. Radack, *supra* note 17, at 127.

214. *Id.* at 128-29.

215. CANONS OF PROF'L ETHICS Canon 37 (1928); see Radack, *supra* note 17, at 128.

216. CANONS OF PROF'L ETHICS Preamble (1928); see Radack, *supra* note 17, at 128.

217. See CANONS OF PROF'L ETHICS Canon 37 (1928) (asserting that "the announced intention of a client to commit a crime is not included within the confidences which [an attorney] is bound to respect"); Radack, *supra* note 17, at 129 (explaining that disclosure may be necessary "to prevent the [crime] or to protect those against whom it is threatened" (quoting CANONS OF PROF'L ETHICS Canon 37 (1928))).

218. CANONS OF PROF'L ETHICS Canon 37 (1928); Radack, *supra* note 17, at 129.

*Professional Responsibility* (“Model Code”).<sup>219</sup> The Model Code contained a confidentiality privilege that extended the protection formally adopted in the ABA’s old Canons.<sup>220</sup> Pursuant to Disciplinary Rule (“DR”) 4-101,<sup>221</sup> the new privilege encompassed client confidences and secrets and forbade attorneys from revealing information “except in the most serious of circumstances, elevating confidentiality to ‘a good of the highest order.’”<sup>222</sup>

After several years of contentious debate and several lengthy studies on the matter, the ABA adopted the Model Rules of Professional Conduct in 1983, and these became the Association’s “official statement of the ethical obligations of attorneys.”<sup>223</sup> Model Rule 1.6, governing the confidentiality of information, prohibited an attorney from disclosing any information concerning a client unless the disclosure was requested by the client or needed to a reasonable extent for the client’s defense.<sup>224</sup> The Rule did not provide for any distinctions with respect to

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219. Radack, *supra* note 17, at 129.

220. *Id.*

221. MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101 (1969), entitled “Preservation of Confidences and Secrets of a Client” states:

(A) “Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

See also Radack, *supra* note 17, at 129.

222. Radack, *supra* note 17, at 129 (quoting Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1108 (1985)).

223. *Id.* at 129-30; see also MODEL RULES OF PROF’L CONDUCT Chairperson’s Introduction (1983).

224. Radack, *supra* note 17, at 130.

the application of the privilege or impose any limitations on a client's right to invoke it.<sup>225</sup> Thus, Rule 1.6 provoked a great deal of controversy during the drafting process with opponents arguing that it contained exceptions that were "less permissive than the Model Code's," which ultimately had the effect of limiting attorney discretion with respect to what information should be disclosed.<sup>226</sup> Although the Rule was finally adopted by the ABA following a lengthy public debate, its unpopularity was evidenced by the fact that less than one-fifth of the states that adopted some version of the Model Rules did so with Model Rule 1.6 in its unaltered form.<sup>227</sup>

Judging from these numbers, it is apparent that many jurisdictions were not keen to adopt the approach to attorney-client confidentiality that was being advanced by the ABA. According to one author, many practitioners and scholars

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225. *Id.*

226. *Id.* (asserting that Model Rule 1.6 is quite clear: "absent the client's consent, a lawyer must keep the client's secrets," but pointing out that it makes a limited exception for communications concerning future crimes); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1983) (permitting attorneys to disclose information without the client's consent, in order "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm").

227. Radack, *supra* note 17, at 130. Here, the author notes, "In recent years, the standards for confidentiality have varied significantly, and sometimes contradictorily, from state to state." *Id.* at 130. According to the author, "[f]orty-two states and the District of Columbia adopted some variation of the Model Rules." *Id.*; *see* COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 555 (2001) (stating that California, Iowa, Maine, Nebraska, New York, Ohio, Oregon, and Tennessee are the only states that do not base their lawyer conduct codes on the Model Rules). Of the states that have adopted some form of the Model Rules, only a few have adopted Rule 1.6 verbatim. Radack, *supra* note 17, at 130; *see also* THOMAS D. MORGAN & RONALD D. ROTUNDA, 2002 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 134-44 (2002) (stating that Alabama, Delaware, District of Columbia, Kentucky, Louisiana, Missouri, Montana, Rhode Island, and South Dakota have adopted Model Rule 1.6, but noting that South Dakota does permit disclosure to rectify frauds or crimes in which the lawyer's services have been used). According to Radack, "[t]he modifications adopted by [the other] states range from dramatic rejections to minor adjustments." Radack, *supra* note 17, at 130 (second alteration in original) (quoting Irma S. Russell, *Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney's Conflicting Duties to Clients and Others*, 72 WASH. L. REV. 409, 445 (1997)). Radack reported that six states still followed the more expansive confidentiality exceptions of the predecessor Model Code DR 4-101. *Id.* Thirty-seven states allowed a lawyer to disclose confidential information to prevent a crime or fraud. *Id.* However, of those thirty-seven states, three allowed disclosure for criminal fraud only, twenty-five allowed disclosure for any crime (including criminal fraud), six allowed disclosure for both criminal and non-criminal fraud, three allowed disclosure to prevent any crime (including criminal and non-criminal fraud), and four states actually required attorneys to report criminal fraud. *Id.* at 130-31. Based on this quick analysis, it is apparent that Radack's assertion that "Rule 1.6 was all over the map, literally and metaphorically," is certainly true, with the "vast majority of states adopting confidentiality standards that were broader than what was permitted by the categorical prohibition of Rule 1.6." *Id.* at 131.

of legal ethics opposed the strict interpretation of confidentiality promoted in the Model Rules because it “at best was ‘lagging behind changes in the profession and society generally,’<sup>228</sup> and at worst, was ‘radically out of step with the realities of the modern world.’”<sup>229</sup> In response to a growing chorus of criticism, in 1997, the ABA appointed the “Ethics 2000 Commission” to review and propose revisions to the Model Rules.<sup>230</sup>

The Ethics 2000 Commission proposed substantial changes to the confidentiality privilege, which included an expansion of the grounds for permissive disclosure under Rule 1.6.<sup>231</sup> Although the commission reaffirmed the legal profession’s commitment to the core value of confidentiality in the strongest terms, they made it a point to stress “the integrity of the lawyer’s own role within the legal system.”<sup>232</sup> In this respect, the Commission “regard[ed] the Rule as out of step with public policy and the values of the legal profession,” and thus recommended revising the confidentiality privilege in order to broaden the right of disclosure beyond the scope promoted in the Model Rules.<sup>233</sup> On February 5, 2002, the ABA House of Delegates adopted the Commission’s recommendations (with amendments agreed upon by the House), and thereafter the revised version of Rule 1.6 became official ABA policy.<sup>234</sup>

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228. Radack, *supra* note 17, at 131 (quoting David W. Raack, *The Ethics 2000 Commission’s Proposed Revision of the Model Rules: Substantive Change or Just a Makeover?*, 27 OHIO N.U.L. REV. 233, 233 (2001)).

229. *Id.* (quoting Russell, *supra* note 227, at 466).

230. *Id.* (explaining that this was the first real look at the Model Rules by the ABA since their adoption in 1983).

231. *Id.* at 131.

232. *Id.* (internal quotation marks omitted) (quoting MARGARET COLGATE LOVE, ABA ETHICS 2000 COMMISSION, FINAL REPORT SUMMARY OF RECOMMENDATIONS (2001), *available at* [http://www.abanet.org/cpr/e2k-mlove\\_article.html](http://www.abanet.org/cpr/e2k-mlove_article.html)).

233. *Id.*

234. *Id.* The Ethics 2000 Rule 1.6 passed in 2002, governing “Confidentiality of Information,” provided:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to secure legal advice about the lawyer’s compliance with these Rules;
  - (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
  - (4) to comply with other law or a court order.

MODEL RULES OF PROF’L CONDUCT, Proposed Rule 1.6 (2001). According to Radack, “[t]he most radical recommendations proposed by the Ethics 2000 Commission with regard to Rule 1.6—the

The goals of the attorney-client privilege and the work-product doctrine are closely related to their professional responsibility counterpart, as adopted in revised Model Rule 1.6.<sup>235</sup> The revised rule explicitly states that, “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted[.]”<sup>236</sup> The comments to Rule 1.6 assert that confidentiality is the “fundamental” component, or “hallmark” of the attorney-client relationship because it creates an environment of trust that promotes the public interest.<sup>237</sup> Despite this proclaimed societal importance, Rule 1.6 does not provide any guidance for practitioners with respect to how they should exercise their reclaimed discretionary authority.<sup>238</sup> This deficiency becomes most apparent in government practice, where attorneys are often left, once again, questioning who their clients are.

Revised Model Rule 1.6 does not define “client” nor give any guidance with respect to the kinds of entities, such as individuals, corporations, or government agencies, that are able to claim “client” status.<sup>239</sup> Because of this lack of guidance, many commentators have presumed that Rule 1.6 applies “whenever a lawyer is serving someone, regardless of who that person or entity is.”<sup>240</sup> On the other hand, some scholars and practitioners have looked to other Model Rules and their accompanying comments, including Model Rule 1.13 governing situations in which an “organization” is a client, for guidance on the issue.<sup>241</sup>

According to Model Rule 1.13, when a lawyer is “employed or retained by an organization . . . [the lawyer] represents the organization acting through its duly authorized constituents.”<sup>242</sup> Rule 1.13 generally requires the lawyer to act in “the best interest of the organization,”<sup>243</sup> and it further provides guidance to practicing lawyers with respect to how they should balance and weigh their duties

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additions of an exception in order to prevent client crimes or frauds reasonably certain to cause substantial economic injury and an exception in order to rectify any injury that has already been caused by client behavior—ended up on the ABA House of Delegates’ cutting room floor.” Radack, *supra* note 17, at 132. On August 12, 2003, however, the ABA House of Delegates, at the urging of the ABA Task Force on Corporate Responsibility, adopted these provisions in order to complement the Sarbanes-Oxley Act of 2002 and new SEC rules that were enacted to promote disclosure of information to prevent economic injury. *Id.*

235. Panas, *supra* note 50, at 546.

236. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2003); Panas, *supra* note 50, at 546.

237. MODEL RULES OF PROF’L CONDUCT R. 1.6, cmts. 2, 6; Panas, *supra* note 50, at 546-47 (explaining that individuals will not “communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter” without this level of trust).

238. *See* MODEL RULES OF PROF’L CONDUCT R. 1.6.

239. Panas, *supra* note 50, at 547.

240. *Id.*

241. *See id.*

242. *See* MODEL RULES OF PROF’L CONDUCT R. 1.13(a); Panas, *supra* note 50, at 547.

243. MODEL RULES OF PROF’L CONDUCT R. 1.13(b); Panas, *supra* note 50, at 547.

with respect to the organization as a whole, and its individual constituents.<sup>244</sup>

For attorneys working for government officials and government agencies, the requirements and guidance contained in Rule 1.13 does not provide much additional help. In the official comments to Rule 1.13, however, the ABA provides the first reference to, and discussion of, the duties of lawyers acting on behalf of a government organization.<sup>245</sup> Comment 9 to Model Rule 1.13 states that:

[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules [Scope 18]. . . . Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. . . . Thus, when the client is a governmental organization, a different balance may be appropriate . . . for public business is involved.<sup>246</sup>

In asserting that the obligation of government lawyers is “a matter beyond the scope of these Rules” the Comment makes explicit reference to “Scope 18” which governs the duties and obligations of attorneys representing private individuals.<sup>247</sup> Because this statement does not provide any additional guidance on the matter, it is not apparent what this reference should mean to an attorney acting in the government sphere. At the very least, this reference “indicates that the duties of lawyers for governmental entities may differ from situations where the client is a private actor” despite the fact that little to no elaboration is provided.<sup>248</sup>

Indeed, in contrast to the current Comment 9 that stresses that an agency or branch can be the client, the former version “generally favored considering the government lawyer’s client to be ‘the government as a whole’ despite the fact that there was no explicit reference to the government attorney at all.”<sup>249</sup> Although some commentators have suggested that the ABA revised the Comment to “incorporate a functional test for determining the identity of the government lawyer’s client,”<sup>250</sup> others have rejected this view, and concluded that, at best, the

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244. See MODEL RULES OF PROF’L CONDUCT R. 1.13(a) (2003); *Id.* R. 1.13(f); Panas, *supra* note 50, at 547 (asserting that Rule 1.13 provides that attorneys may have to instruct constituents of the organization, such as directors, officers, shareholders, and employees, that the organization itself is the client in situations where the constituent’s interests may differ from those of the client).

245. Panas, *supra* note 50, at 548-49.

246. See MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 9; Panas, *supra* note 50, at 548.

247. MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 9; Panas, *supra* note 50, at 547-48.

248. Panas, *supra* note 50, at 548.

249. *Id.*; STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 156 (Aspen 2005) (discussing the differences between old and new rules and comments).

250. Panas, *supra* note 50, at 548 (internal quotation marks omitted) (quoting Margaret Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 460 (2002)).

new approach merely advocates a case by case analysis and detracts from the “government-as-a-whole approach” in determining who the government’s client is.<sup>251</sup>

In short, despite the reference to government lawyers contained in Comment 9 to Model Rule 1.13, and the general indication that an agency-approach may be more appropriate than the government-as-a-whole approach, the “Model Rules ultimately leave unclear the exact parameters of the government lawyer’s duties.”<sup>252</sup>

### *B. State Regulation of Attorney Ethics*

The proclamations of individual state bar associations, and their views on the ABA’s approach, as expressed in Model Rule 1.6, also provide insight into the future direction of the attorney-client privilege in the government context.

1. *Hawaii*.—Hawaii has gone further than any other state in defining the parameters of the government attorney-client privilege by including specific language applicable to government attorneys in the state’s Rules for Professional Conduct.<sup>253</sup> In adopting their own version of Rule 1.6, the state of Hawaii has chartered a new course in the path toward a robust attorney-client privilege by adopting rules for professional conduct that extend to attorneys representing clients in the public sector.

Similar to the ABA’s Model Rule 1.6, Hawaii’s Rule 1.6 establishes a duty of confidentiality with respect to communications between an attorney and her client.<sup>254</sup> In addition to this general mandate, Hawaii included two exceptions to the duty of confidentiality that are specifically applicable to government attorneys. Pursuant to Hawaii’s Rule 1.6, a government attorney

may reveal information relating to representation of a client to the extent

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251. See Panas, *supra* note 50, at 548. In addition to Model Rule 1.13, and its accompanying Comments, Model Rule 1.11, which governs conflicts of interest with former and current government employees and officers, has also provided limited guidance for attorney’s operating in the government sphere. *Id.* Although the Rule appears to establish an agency-approach, in actuality, “it retreats from that position in several key places.” *Id.* For example, although the Rule states that attorneys who once worked for the government may not take on clients with matters relating to those that they were involved with “personally and substantially” while acting as a government attorney, “unless the appropriate government agency” consents, Comment 4 arguably adopts a narrower, “agency” standard (along with the personal and substantial involvement language) to insure that potential disqualifications due to conflict of interest remain at a minimum. *Id.* Despite this general statement, this Rule does not provide any real addition to the Model Rules approach to the government attorney problem. See *id.*

252. *Id.* at 549.

253. See HAW. RULES OF PROF’L CONDUCT R. 1.6 (2005).

254. HAW. RULES OF PROF’L CONDUCT R. 1.6(a) (stating that, “[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c)”).

the lawyer reasonably believes necessary . . . to prevent a public official or public agency from committing a criminal or illegal act that a government lawyer reasonably believes is likely to result in harm to the public good . . . [or] to rectify the consequences of a public official's or a public agency's act which the government lawyer reasonably believes to have been criminal or illegal and harmful to the public good.<sup>255</sup>

By including permissive disclosure provisions that apply specifically to governmental attorneys in their Rules for Professional Conduct, Hawaii's legislature took a stand and reasserted the importance of recognizing an attorney-client privilege in the public sphere. Although these provisions permit disclosure by a government attorney in certain circumstances, and thus appear to weaken the rules of confidentiality as they apply to government lawyers, the commentary that accompanies the rule clearly envisions a robust privilege of confidentiality that would apply to all practicing attorneys within the state. With respect to government attorneys, Comment 6 explicitly states that "[t]he requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance."<sup>256</sup> Therefore, although Hawaii's rule of confidentiality permits disclosure by government attorneys when it will achieve a public good, or prevent some harm to the public interest, the rule still recognizes that confidentiality is an important value that must be preserved. By striking such a balance, Hawaii takes the position that, despite the inherent difficulties involved and conflicting interests at play, a robust government attorney-client privilege can survive in the face of strong public policy concerns.<sup>257</sup>

2. *California*.—California has adhered to the general approach, exemplified

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255. HAW. RULES OF PROF'L CONDUCT R. 1.6(b)(4) & (5). In addition to the two exceptions noted, the Rules also provide that all attorneys "shall reveal information which clearly establishes a criminal or fraudulent act of the client in the furtherance of which the lawyer's services had been used, to the extent reasonably necessary to rectify the consequences of such act, where the act has resulted in substantial injury to the financial interests or property of another. HAW. RULES OF PROF'L CONDUCT R. 1.6(c). As discussed *infra* Part II.B.3, a similar exception is contained in Indiana's ethics code.

256. HAW. RULES OF PROF'L CONDUCT R. 1.6 cmt. 6.

257. Although no other state has gone as far as Hawaii in recognizing the existence of a government attorney-client privilege, and defining its general scope, Florida has made moves in this general direction. See FLA. ETHICS OPINION 77-25. Although Florida has not amended their rules of professional conduct in the same manner as Hawaii, it has rendered ethics opinions that do contemplate the existence of a government attorney-client privilege. See, e.g., FLA. ETHICS OPINION 77-25. More specifically, these opinions suggest that a government attorney must choose between his or her duty of confidentiality and his or her duty with respect to the public at large; indeed, it is suggested that, in some circumstances, a government attorney must step back and enter private practice in order to maintain confidentiality in the face of an overwhelming public interest in disclosure. *Id.*

by ABA Model Rule 1.6, which provides for a qualified attorney-client privilege of confidentiality.<sup>258</sup> Like ABA Rule 1.6, California's Rule 3-100 stresses the importance of confidentiality, by mandating that "[a] member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule."<sup>259</sup> By making reference to the Business and Professions Code, Rule 3-100 emphasizes the importance of confidentiality in the attorney-client privilege, and suggests that, in the most extreme cases, an attorney may be prohibited from disclosing information revealed by a client, even to the lawyer's own detriment.<sup>260</sup>

Judging from the language adopted in the California Rules, and the limited permissive disclosure provisions contained therein,<sup>261</sup> it is clear that Rule 3-100 adheres to an even stricter standard than the ABA's model rules.<sup>262</sup> Indeed, California's policy in keeping sacrosanct the attorney-client privilege and attorney-client confidentiality is clarified in the California Bar Association's discussion of Rule 3-100, which states that "[a] member's duty to preserve the confidentiality of client information involves public policies of paramount importance . . . [p]reserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship."<sup>263</sup> Furthermore, the discussion states that confidentiality is to be broadly applied to any

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258. CAL. RULES OF PROF'L CONDUCT R. 3-100 (2004).

259. *Id.* R. 3-100(A). Section 6068 of California's Business and Professions Code states that it is the duty of a member, "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client." CAL. BUS. & PROF. CODE § 6068 (West 2005).

260. *See* CAL. RULES OF PROF'L CONDUCT R. 3-100(A); CAL. BUS. & PROF'L CODE § 6068.

261. Rule 3-100(B) offers only one exception to the duty of confidentiality, that is, when the attorney "reasonably believes that the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial harm to, an individual." CAL. RULES OF PROF'L CONDUCT R. 3-100(B). Clearly, although a lawyer is under no duty to reveal information from a client that a crime may be committed, if such information is to be revealed, the attorney must first attempt to persuade the client not to commit the act or pursue a course of conduct that will prevent the threatened death or bodily harm. *See id.* R. 3-100(C). Therefore, the attorney must warn the client of his or her decision to reveal the "confidential" information, and, in the event that the attorney does decide to reveal such information, the disclosure "must be no more than is necessary to prevent the criminal act[.]" *Id.* R. 3-100(D).

262. Although the ABA's standards for attorney-client confidentiality are high, California's standards seem to be even stricter. Unlike the ABA's DR 4-101, California's Rule 3-100 does not contain an exception permitting the attorney to release confidential information to collect or establish his or her fee, or to defend himself or herself against an accusation of wrongful conduct. California's Rule 3-100 also does not contain an exception to reveal information under court order or by law.

263. CAL. RULES OF PROF'L CONDUCT R. 3-100 discussion [1], available at [http://www.calbar.ca.gov/state/calbar/calbar\\_extend.jsp?cid=10158](http://www.calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158) (follow hyperlink for 3-100) (last visited Apr. 21, 2006).

information shared between attorneys and clients during representation.<sup>264</sup>

In adhering to this strict approach, the California Bar Association maintains that a privilege of confidentiality is beneficial to the immediate attorney-client relationship, and it is an essential component of our justice system; thus, “informing a client about limits on confidentiality may have a chilling effect on client communication. . . . When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member’s representation of the client impossible.”<sup>265</sup> Thus, California recognizes that by preserving the attorney-client privilege and the duty of confidentiality, the justice system is strengthened in the eyes of the general public.<sup>266</sup>

3. *Indiana*.—In the preamble to the Indiana Rules of Professional Conduct, the importance of confidentiality in the attorney-client relationship is emphasized by asserting that “[a] lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.”<sup>267</sup> The individual rules of professional conduct, specifically Rule 1.6 which governs confidentiality, exemplify this point, although its vague provisions leave its exact scope unascertainable.<sup>268</sup>

Like the rules discussed in prior sections, Indiana’s Rule 1.6(a) first sets out the general principle that “[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation or the disclosure is

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264. CAL. RULES OF PROF’L CONDUCT R. 3-100 discussion [2], *available at* [http://www.calbar.ca.gov/state/calbar/calbar\\_extend.jsp?cid=10158](http://www.calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158) (follow hyperlink for 3-100) (last visited Apr. 21, 2006) (stating that “[t]he principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, as all established in law, rule and policy”).

265. CAL. RULES OF PROF’L CONDUCT R. 3-100 discussion [10], [11], *available at* [http://www.calbar.ca.gov/state/calbar/calbar\\_extend.jsp?cid=10158](http://www.calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158) (follow hyperlink for 3-100) (last visited Apr. 21, 2006).

266. This is not to say, however, that all information between attorney and client may be classified as “confidential.” On July 1, 2004, by order of the Supreme Court of California, the California Bar Association accepted that “Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law.” CAL. RULES OF PROF’L CONDUCT discussion [13], *available at* [http://www.calbar.ca.gov/state/calbar/calbar\\_extend.jsp?cid=10158](http://www.calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158) (follow hyperlink for 3-100) (last visited Apr. 21, 2006) (leading to the possibility that this strict Rule of Professional Conduct may in fact be precluded by an existing or forthcoming California law).

267. IND. RULES OF PROF’L CONDUCT Preamble, ¶ 4 (2005).

268. Unlike the ABA’s Model Rules, the Indiana Rules of Professional Conduct do not define exactly what a “client” is, nor do they distinguish a “secret” from a “confidence.” *See* IND. RULES OF PROF’L CONDUCT R. 1.6.

permitted by paragraph (b)."<sup>269</sup> Similar to the approach adopted by the ABA, Indiana Rule 1.6 includes an exception that would permit an attorney to disclose confidential communications for the purposes of preventing a crime or reasonably certain death or substantial bodily harm.<sup>270</sup> Indiana permits disclosure of confidential information only "to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."<sup>271</sup>

Although there are several exceptions to the rules of confidentiality contained in Indiana's Rules of Professional Conduct, it is clear that Indiana's Rules seek to promote and protect the preservation of client confidences and secrets. In Comment 2 accompanying Indiana's Rule 1.6, it is asserted that "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."<sup>272</sup> In the event that a lawyer is ordered to disclose certain information that should be kept confidential, Comment 13 requires the attorney to "assert on behalf of the client all non-frivolous claims that the order is not authorized by other law or that the information sought is protected by the attorney-client privilege or other applicable law."<sup>273</sup> The commentary accompanying Indiana's confidentiality rule stresses that attorneys should be reluctant to disclose confidential information and should do so only in rare and extreme cases.<sup>274</sup>

#### 4. *New York.*—New York State's ethics standards concerning the

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269. *Id.* R. 1.6(a).

270. *Id.* R. 1.6(b)(1), (2); MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980). Compliance with "other law or court order" is also an exception wherein the attorney "may reveal information relating to the representation of a client to the extent the attorney believes necessary." IND. RULES OF PROF'L CONDUCT R. 1.6(b)(6). The obligation of confidentiality can also be disregarded by a lawyer

to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

*Id.* R. 1.6(b)(5). Moreover, a client's information can be revealed "to secure legal advice about the lawyer's compliance with these rules." *Id.* R. 1.6(b)(4).

271. *Id.* R. 1.6(b)(3).

272. *Id.* R. 1.6 cmt. 2.

273. *Id.* R. 1.6 cmt. 13.

274. Indeed, even prospective clients receive some protection from disclosure of information under Indiana's Rules. *Id.* R. 1.18(b) (stating "[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client"). Indiana, therefore, like the ABA, California, and New York, sees the duty of confidentiality and the attorney-client privilege as important obligations to protect even though a formal attorney-client relationship has not been established.

preservation of client confidences are generally compatible with the standards espoused in the American Bar Association's Disciplinary Rules. Like ABA Disciplinary Rule 4-101, New York's Disciplinary Rule 4-101 creates separate definitions for the terms "confidence" and "secret,"<sup>275</sup> and includes provisions mandating their protection and exceptions that would permit their disclosure.<sup>276</sup> Unlike the ABA's Disciplinary Rules, New York adds a fifth exception governing the withdrawal of written or oral opinions, or representations previously given by the lawyer which are expected to be relied upon by a third person, if they are found to contain "materially inaccurate information or [are] being used to further a crime or fraud."<sup>277</sup>

Though New York's Disciplinary Rules are similar to the broader standards of the ABA, New York's Ethical Considerations stress that confidentiality is an important part of the attorney-client relationship, and that it promotes efficiency of the justice system as a whole.<sup>278</sup> More specifically, these ethical considerations stress that if information is to be revealed it should be done so in as limited a fashion as possible.<sup>279</sup> The Ethical Considerations explain the importance of trust between an attorney and a client,<sup>280</sup> and note that, although the attorney-client privilege is more limited than the ethical obligation to guard the confidences of the client, "[a] lawyer should endeavor to act in a manner which preserves the

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275. See LAWYER'S CODE OF PROF'L RESPONSIBILITY DR. 4-101 (2002); MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980). In New York, "confidence" refers to information protected by the attorney-client privilege under law, while "secret" is information gained in the professional relationship that the client has asked be held "inviolable" or if revealed "would be embarrassing or would likely be detrimental to the client." N.Y. LAWYERS' CODE OF PROF'L RESPONSIBILITY DR 4-101(A).

276. N.Y. LAWYERS' CODE OF PROF'L RESPONSIBILITY 4-101(B), (C). These exceptions permit disclosure where the client affected gives consent after full disclosure, where the release of information is permitted under the Disciplinary Rules or is required by law or by court order, or where there is an intention of the client to commit a crime. *Id.* DR 4-101(C). New York's disciplinary rule also permits disclosure of confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer's employees or associates against an accusation of wrongful conduct. *Id.* DR 4-101(C).

277. *Id.* DR 4-101(C)(5).

278. See, e.g., *id.* EC 4-7.

279. *Id.* EC 4-7 (stating that "[t]he lawyer's exercise of discretion to disclose confidences and secrets requires consideration of a wide range of factors and should not be subject to reexamination . . . a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose").

280. *Id.* EC 4-1 ("Both the fiduciary relationship existing between lawyer and client and the proper function of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer. . . . The observance of the ethical obligation of a lawyer to hold inviolable the confidences and secrets of a client not only facilitates the full development of facts essential to proper representation of the client but also encourages non-lawyers to seek early legal assistance.").

evidentiary privilege.”<sup>281</sup> Accordingly, just as California, Indiana, and the ABA standards require an attorney to represent their client zealously within the bounds of the law, except under a few enumerated exceptions, the New York Disciplinary Rules also seek to promote the attorney-client relationship by emphasizing due care with respect to disclosure. As stated in Ethical Consideration 4-2, “[a] lawyer must always be sensitive to the rights and wishes of the client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in the professional relationship.”<sup>282</sup>

5. *Summary of State Ethics Requirements.*—Despite a few differences in their codes, all of the jurisdictions discussed share a common goal of preserving and promoting the duty of confidentiality in the lawyer-client relationship. Although only Hawaii’s code specifically makes mention of the attorney-client relationship as it applies to government attorneys, these rules do indicate that the rules concerning confidentiality are to be applied broadly among the legal population. None of the state codes or rules examined contains language in its preamble suggesting any distinction in application to government lawyers versus private practitioners. Rather, all lawyers, regardless of employer, are bound by these disciplinary rules, model rules, and professional codes. Accordingly, the duty of confidentiality should apply to all legal professionals, regardless of the context in which they operate. Moreover, if communications with prospective clients are entitled to protection, government lawyers and the entities they represent should be afforded the same protections. It is inconsistent to require a duty of confidentiality as a mandate of professionalism but not recognize it as a part of the common-law privilege for some lawyers and clients.

### III. THE WORK PRODUCT DOCTRINE

The work product doctrine has, in many ways, run parallel to the principles of attorney-client privilege.<sup>283</sup> Information falling within the attorney-client privilege may, for example, be incorporated into the work product of an attorney, thus providing protection for the document within both privileges. It is for this reason that when the attorney-client privilege is under scrutiny, it is relevant to look to the work product doctrine as well.<sup>284</sup>

Unlike the attorney-client privilege, the work product doctrine “is relatively new to American jurisprudence.”<sup>285</sup> The doctrine was judicially created by the U.S. Supreme Court in *Hickman v. Taylor*.<sup>286</sup> In *Hickman*, the plaintiff’s attorney

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281. *Id.* EC 4-4.

282. *Id.* EC 4-2.

283. The work product doctrine protects the product of the attorney which included papers, notes, memos, thought process, and case strategy as outlined in *Hickman v. Taylor*, 329 U.S. 495 (1947).

284. There are several aspects of the work product doctrine that parallel the attorney-client privilege.

285. Radson & Waratuke, *supra* note 6, at 825.

286. 329 U.S. at 510-12.

demanded witness statements taken by the defendant's attorney, and asserted that the defendant's attorney was required to answer deposition questions and interrogatories outlining what the witness had told him, pursuant to the applicable rules of civil procedure.<sup>287</sup> Although the Court recognized the important policy interests promoted through the liberalization of the discovery process, it also recognized that attorneys need to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel," when preparing cases on behalf of their clients.<sup>288</sup> After balancing these competing policy interests, the Supreme Court unanimously rejected the plaintiff's position, and asserted that documents and other tangible items, as well as intangible materials reflecting the attorney's thought process, prepared "with an eye toward litigation" should remain privileged.<sup>289</sup>

Thus, the holding in *Hickman* set forth the principles of what came to be known as the "work product rule."<sup>290</sup> Although the case involved the application of the work product privilege in the context of private civil litigation, the Supreme Court later extended the privilege to criminal cases.<sup>291</sup> The Court further reaffirmed these "strong public policy" considerations when it recognized the work product privilege for corporations in *Upjohn*, over thirty years later.<sup>292</sup>

In 1998, the Second Circuit further broadened the scope of the work product privilege by asserting that the privilege applied to documents prepared by an attorney in anticipation of litigation, and not just to those documents prepared during actual litigation proceedings.<sup>293</sup> In addition, the court asserted that this

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287. *Id.* at 501; Radson & Waratuke, *supra* note 6, at 825 (stating that "the plaintiff's attorney demonstrated no need for the information other than to 'help prepare himself to examine witnesses, to make sure he overlooked nothing'").

288. *Hickman*, 329 U.S. at 510-11.

Were those materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interest of the clients and the cause of justice would be poorly served.

*Id.*; see also Dawson v. New York Life Ins. Co., 901 F. Supp. 1362, 1368 (N.D. Ill. 1995) (explaining that the attorney work product doctrine is "distinct from and broader than the attorney-client privilege," and was "developed to protect the work of an attorney from encroachment by opposing counsel;" the doctrine "consists of a multi-level protection whereby that information most closely related to an attorney's litigation strategy is absolutely immune from discovery, while that information with a more tenuous relationship to litigation strategy might be available in circumstances evidencing substantial need or undue hardship on the part of the discovery proponent").

289. *Hickman*, 329 U.S. at 510-11; see Radson & Waratuke, *supra* note 6, at 829.

290. See Radson & Waratuke, *supra* note 6, at 826.

291. United States v. Nobels, 422 U.S. 225, 238 (1975).

292. *Upjohn v. United States*, 449 U.S. 383 (1981) (internal quotation marks omitted).

293. United States v. Adlman, 134 F.3d 1194, 1204 (2d Cir. 1998).

privilege would include all conversations between an attorney and client in anticipation of litigation, or documents prepared therefrom, even in cases where a client consulted an attorney for advice involving a business decision.<sup>294</sup> Two years after this decision by the Second Circuit, the attorney work product privilege was codified in the Federal Rules of Civil Procedure,<sup>295</sup> and today, the privilege is uniformly accepted by all courts.<sup>296</sup>

Although the work product doctrine and attorney-client privilege overlap to a certain degree, there are some important differences. First, the work product doctrine seeks to protect the interests of the attorney and the client, unlike the attorney-client privilege, which belongs to the client alone.<sup>297</sup> Therefore, the attorney work product privilege must be waived by the client as well as the attorney.<sup>298</sup> This has led many federal courts to hold that an attorney may claim the privilege to protect his own mental impressions, conclusions, opinions, and legal theories about the case, even when the documents show ongoing client fraud, which would prevent the client from invoking the privilege in his own defense.<sup>299</sup> Second, unlike the attorney-client privilege, the work product privilege is generally not waived when the work product is shared with third parties.<sup>300</sup> "Because the purpose of the privilege is to protect the work product from the knowledge of and use by opposing counsel, sharing the document with third parties does not waive its protection."<sup>301</sup> However, as a practical matter, some have suggested that when attorney work product is shared with many others, so as to increase the opportunity for opposing counsel to get the information, it could constitute a waiver of the privilege.<sup>302</sup>

Courts have applied the work product doctrine to shield documents from discovery and from FOIA requests. This suggests that there are communications and documents prepared by government lawyers that are confidential or protected from disclosure. In addition to claiming the attorney-client privilege, where appropriate, government attorneys should assert their ethical/professional responsibilities to maintain client confidentiality as well as the work product

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294. *Id.*

295. See FED. R. CIV. P. 26(b)(3) (stating that an attorney's work product, including documents prepared in anticipation of litigation, should be protected from discovery by the courts unless the proper showing has been made); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 136(1) (Proposed Final Draft No. 1, 1996) (material "prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation).

296. Radson & Waratuke, *supra* note 6, at 826.

297. *In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994) (stating that an attorney may assert the work-product privilege).

298. *In re Grand Jury Proceedings* (FMC Corp.), 604 F.2d 798, 801-02 (3d Cir. 1979).

299. Radson & Waratuke, *supra* note 6, at 829; see, e.g., *In re Grand Jury Proceedings*, 43 F.3d at 972; see also *In re Special Sept. 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980).

300. *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 593 (3d Cir. 1984); *In re Grand Jury Proceedings*, 43 F.3d at 972.

301. Radson & Waratuke, *supra* note 6, at 829.

302. *Id.*

doctrine to maintain confidential communications with their clients.

#### IV. RECOMMENDATIONS TO CLARIFY THE EXISTENCE OF THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE OF CONFIDENTIALITY

What follows are both strategies for most effectively invoking the attorney-client privilege in the government context, as well as options for reform to clarify the existence of the government attorney-client privilege of confidentiality. Support from lawyers in both the public and private sector will be essential to ensure that the privilege is recognized and enforced in the future.

##### *A. Advice for Government Lawyers*

1. *Take an Active Role in Reform Efforts.*—Government lawyers (and their clients) clearly have the most at stake, requiring them to become active participants in any ongoing debate and dialogue surrounding both the privilege of confidentiality and the ethical responsibility to maintain client confidences. Although this charge may seem obvious, it may present significant challenges for public sector attorneys who, as a group, may not be as active in organized bars. In addition, because of other government ethics laws and regulations, public sector attorneys may not always be able to participate in the drafting or filing of amicus curiae cases, nor may they consistently be afforded opportunities by their government employers to participate in bar association and law reform activities. For those government lawyers who are able to participate in organized bar activities, this subject should be at the top of the agenda for groups within the American Bar Association including the Administrative Law Section, the State and Local Government Law Section, and the Government and Public Sector Lawyers Division. Active representation by government lawyers in entities such as the Standing Committee on Professionalism and special task forces, including the current Task Force on the Attorney-Client Privilege, is essential to make certain that the private bar is fully informed about and sensitized to the unfortunate lack of uniformity in the application of standards within the profession.

2. *Create a Paper Trail to Demonstrate That the Elements of the Common Law Privilege are Satisfied.*—Part I.B of this Article sets forth the eight elements required for the common-law privilege to attach. It is particularly important for government lawyers both to maintain records demonstrating that conversations are covered under the privilege and to take care to articulate that these elements were satisfied when the conversations occurred. So, for example, government lawyers must be clear to distinguish for themselves and their clients whether a particular conversation involves the request for or communication of legal advice (as opposed to policy advice or political strategic advice). In addition, government lawyers must be clear to identify “which client” they provided the legal advice to. For example, following the dicta in the Eighth and D.C. Circuit Courts cases, government attorney Anna George asserted that her client in Connecticut was not the former Governor as an individual, but rather the “Office

of the Governor,” which included the Governor and key members of his staff.<sup>303</sup> Although this may have proved persuasive to the Second Circuit, it leaves open the possibility of the scenario that the Seventh Circuit admittedly did not address—whether a successor political figure in a particular “government office” can waive the privilege.

3. *Advise Clients About the Uncertainty of the Ability of Government Lawyers to Maintain Confidentiality.*—As a result of the current uncertainty, government lawyers have an obligation to discuss the potential for disparate application of both the common law evidentiary privilege and the rules of professional conduct governing confidential conversations between lawyers and their clients in the public and private sectors. Proactive education and information sharing about this issue will promote a level playing field for political actors, who, absent further legislative or judicial pronouncements on this issue, may inadvertently rely on a mistaken belief that conversations seeking legal counsel will automatically be protected from disclosure. A conversation or written memo on point can provide some small level of comfort to attorneys who must also provide zealous representation for clients.

### B. Legislative Reform

Although the Second Circuit decision did not hinge on the fact that the State of Connecticut has a unique statute that affords protection of confidential communications between government attorneys and their clients,<sup>304</sup> the persuasive nature of the existence of the statute suggests that legislative bodies should consider adopting similar statutes or laws at the federal, state, and local levels. This action would, at a minimum, signal strong public policy support for the notion that such conversations are entitled to remain confidential. The Connecticut statute, which offers a good model, provides:

[i]n any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure.<sup>305</sup>

The level of protection offered by this statute is most closely akin to the philosophy behind the California Rules of Professional Conduct, which holds the

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303. *In re Grand Jury Investigation (Doe)*, 399 F.3d 527, 533 (2d Cir. 2005).

304. This is because it was a federal court addressing federal law. The Court stated “We do not suggest, of course, that federal courts, charged with formulating federal common law, must necessarily defer to state statutes in determining whether the public welfare weighs in favor of recognizing or dissolving the attorney-client privilege. But we cite the Connecticut statute to point out that the public interest is not nearly as obvious as the Government suggests.”

*Id.* at 534.

305. CONN. GEN. STAT. § 52-146r (b) (2005).

privilege sacrosanct, and other than client waiver, provides for no other exception when disclosure could be compelled. States may choose to provide broad coverage for government lawyers at the state level only or include those who perform at the municipal level. Congress should consider a statute to similarly cover federal government lawyers. This would ensure that conversations between members of Congress and their public counsel, as well as conversations between executive and judicial branch attorneys and their clients, are protected.

### C. *The ABA Must Demonstrate Leadership*

As the ABA serves as the voice of the profession,<sup>306</sup> it is imperative for it to take a leadership role in stimulating the discussion and debate on this critical issue facing the profession. Although government lawyers only comprise roughly eight percent of the practicing bar,<sup>307</sup> lack of serious attention to this issue will continue to foster a decrease in public confidence in the legal profession. In fact, other bar associations have noted the importance of preserving client confidences as crucial to maintaining public confidence in lawyers.<sup>308</sup>

1. *A Call to the ABA Task Force on the Attorney-Client Privilege.*—On April 8, 2006, ABA President Michael Greco delivered a speech to the American Council of Trial Lawyers in defense of the attorney-client privilege.<sup>309</sup> In describing the privilege as a “bedrock principle of the American justice system and our democracy,”<sup>310</sup> he stated, in part,

Threats to the privilege and work product protections . . . represent just one front in a growing governmental assault on the independence of the legal profession itself, and on the ability of lawyers effectively to counsel clients. A wide range of government policies and practices are now combining—either coincidentally or by design—to attempt to marginalize and diminish the lawyer’s role in society as trusted advisor, counselor, and defender of rights.<sup>311</sup>

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306. “The Mission of the American Bar Association is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law.” See American Bar Association, ABA Mission, <http://www.abanet.org/about/home.html> (last visited Apr. 21, 2006).

307. AMERICAN BAR ASSOCIATION, LAWYER DEMOGRAPHICS (2005), available at <http://www.abanet.org/marketresearch/lawyerdemographics-2005.pdf>.

308. See, for example, an article published by The Missouri Bar, Christian Stiegemeier, *While the Public Perception of Lawyers Is Nothing New, There Are Steps You Can Take to Change It*, <http://www.mobar.org/a4eb6e40-1fe6-446f-aef7-9b0a66e1e677.aspx> (last visited Apr. 21, 2006).

309. Michael S. Greco, President, American Bar Association, Address to American College of Trial Lawyers on Defense of Attorney Client Privilege (Apr. 8, 2006), available at <http://www.abanet.org/op/greco/memos/triallawyersaddress.shtml>. It should be noted that the speech does not specifically address the government attorney-client privilege, but rather the privilege in general.

310. *Id.*

311. *Id.*

President Greco further asserted that,

In the end, erosion of the attorney-client privilege will marginalize the lawyer and the lawyer's ability to defend liberty and pursue justice. Erosion of the lawyer-client relationship will lead to the diminishment of the lawyer's role in society because clients will no longer entrust confidences with and seek counsel from their lawyers. And such diminishment will lead to a less effective, less respected, and greatly reduced lawyer's role in society not only in particular client matters, but more broadly.<sup>312</sup>

President Greco concluded by promising that, "The ABA Task Force on Attorney-Client Privilege will continue the ABA's vigorous efforts to preserve the vital attorney-client and work product protections . . ."<sup>313</sup>

This ABA Task Force has, to date, publicly focused on other aspects of the attorney-client privilege that do not squarely address the issues raised in this Article. It would be a travesty if the Task Force concludes its work without taking an equally forceful position recognizing the critical importance of the privilege for government attorneys and their government clients.

2. *Clarification of the Model Rules.*—Between 1997 and 2002, the ABA Ethics 2000 Commission worked to modernize the Model Rules of Professional Conduct.<sup>314</sup> In light of the subsequent and ongoing confusion over whether conversations between government attorneys and their clients are required to remain confidential, it would be appropriate for the ABA to re-examine the language of Rule 1.6 as well as the accompanying commentary for purposes of clarifying that the duty to protect client confidences applies in the public sector. A re-examination of the Model Rules seems outside the jurisdiction of the task force created to examine the attorney-client privilege, yet the ethical mandate to maintain client confidences should apply equally in the public and private sectors. The ABA must include consideration of this reform as part of its agenda to address the privilege of confidentiality.

#### *D. Judicial Recognition of the Privilege*

When political issues are separated from the aforementioned underlying foundational principles that protect conversations between attorneys and their clients, courts should find persuasive the rationale advanced by the Second Circuit in quickly concluding that government attorneys and their clients are entitled to invoke the attorney-client privilege. The common law rule of precedent supports this outcome, and, in fact, none of the other circuits flatly denied that such a privilege exists. Rather, the Seventh, Eighth and D.C. Circuits, by their own

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312. *Id.*

313. *Id.*

314. See American Bar Association, Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000"), Chair's Introduction (Aug. 2002), [http://www.abanet.org/cpr/mrpc/e2k\\_chair\\_intro.html](http://www.abanet.org/cpr/mrpc/e2k_chair_intro.html).

admissions, simply failed to find the privilege in the specific facts presented to them in each case. The circuitous rationale perhaps represented an argument in search of a desired outcome, carefully crafted so as not to be entirely dismissive of the long established privilege.

The courts need guidance from the Bar as to appropriate and expected protections of client confidences from an ethics and professionalism perspective. Courts would also benefit, as did the Second Circuit, from legislative pronouncements indicating public policy positions in favor of confidentiality. Regardless, however, of whether these reforms can be accomplished before the next test case makes its way to a circuit court or to the U.S. Supreme Court, the underlying fundamental principles supporting a “bedrock rule” of confidentiality of conversations between lawyers and their clients have not, up until the Whitewater cases before the Eighth and D.C. Circuits, been viewed as applying differently depending upon who was compensating the attorney for the legal advice. The Judiciary has an obligation to apply the common law privilege without discriminating between the practice setting of the lawyer involved.<sup>315</sup>

CONCLUSION

The sanctity of the attorney-client relationship must not be undermined by the whim of partisan politics. Although it is true that government attorneys, like all other government officials, have a higher duty to protect public trust and integrity in government, abolishing the historic attorney-client privilege in the government context is neither necessary nor appropriate to accomplish this goal. The organized bar, the judiciary and the legislative branches of the federal, state, and perhaps local governments must each take the appropriate steps to ensure that standards of attorney professionalism and evidentiary privileges are applicable to those admitted to the bar regardless of whether they are employed in the public, private, or non-profit sectors. The political maneuvering and posturing evident in the background of the circuit court cases involving allegations about and investigations of a U.S. President, a First Lady, and two state governors, as well as the current split among the circuits, cries out for a clarification of the rules of professionalism and the common law privilege. Absent action by the organized bar and legislatures, the U.S. Supreme Court will undoubtedly be called upon to resolve the inconsistencies in the lower courts’ application of the common law privilege, without the benefit of a record of meaningful dialogue and debate to provide guidance leading to a just and fair resolution.

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315. It is the practice setting that has seemingly agitated the earlier courts. This is evident from the admonition offered that if public officials desire to seek protection of their conversations with lawyers, they should hire private sector lawyers to represent them. So, it is not that the non-attorney government actor can never claim the privilege; the courts have suggested that lawyers who work for the government do not offer that “protection” because they are publicly paid rather than privately compensated.



## 2005 JAMES P. WHITE LECTURE ON LEGAL EDUCATION

### THE JUDICIARY OF ENGLAND AND WALES AND THE RULE OF LAW\*

THE RT. HON. THE LORD WOOLF OF BARNES\*\*

#### INTRODUCTION

This lecture was entirely due to the generous invitation of the most distinguished emeritus Dean, Jim White. Professor White's reputation is as high on my side of the Atlantic as it is on yours. His contribution to the development of legal systems has not been confined to jurisdictions with developed legal systems, such as those of my country and yours. It extends to the emerging democracies, especially those in Eastern Europe. For those countries, developing a credible legal system was and is critical for their economic development. Their economies will not flourish unless they can be shown to adhere to the rule of law. This will not happen if they do not have lawyers who have been properly educated and trained. In many countries the American Bar Association ("ABA") can be proud of the contribution it has made to providing that education. That the ABA's contribution was so successful is to a significant extent due the fact that for twenty-six years the ABA's consultant on legal education was James White. These lectures are intended to commemorate this achievement. I hope what I have to say will at least come close to being worthy of that objective.

It was through the ABA that I first met Professor White. In 1950, the ABA held their annual conference in London. At that time the ABA erected a monument to commemorate the execution of Magna Carta. In 2000, the conference was repeated and, again, a ceremony took place at Runnymede. On this occasion, Justice Sandra O'Connor spoke on behalf of the U.S.A. and I spoke on behalf of the U.K. Justice O'Connor is an old mutual friend, and Jim and I first met at Runnymede when she introduced us. It was an appropriate place for Jim and I to meet since Magna Carta is certainly one of the most important sources of both our legal systems.

In addition, Magna Carta was executed at approximately the same time as when the English judges, who were responsible for upholding justice throughout the kingdom on behalf of the King, began riding around the different circuits into

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\*\* Former Lord Chief Justice of England and Wales.

which England and Wales were divided.<sup>1</sup> Although the mode of transport has changed, this still happens in very much the same way today. The judges who travel on circuit are now our High Court judges, and they are the backbone of our justice system. They have been responsible for developing our legal system so that it is capable of meeting the needs of the public in the Twenty-first Century. For example, they have played the most significant role in developing judicial review, without the benefit of an entrenched constitution, so as to make the legality of every activity of public bodies subject to review. They are the judges now primarily responsible for protecting human rights and ensuring that we have a legal system that is now rights based.

### I. THE INFLUENCE OF MAGNA CARTA

It is an extraordinary fact that the fundamental common law principles that are such an important part of our own and many other legal systems can be traced back 790 years to Magna Carta. This was the time when John was King of England and was having difficulties with his barons due to the extortionate taxes that he had imposed. There had been ruthless reprisals against defectors, and the administration of justice was capricious. The result was that the barons became disaffected. They knew King John needed their support for his further military adventures which strengthened their bargaining power. The barons did not miss the opportunity, and in January 1215, the barons collectively decided upon industrial action. They insisted that, as a condition of their support, King John execute a charter that recognised their liberties as a safeguard against further arbitrary behaviour on his part.

On June 10, 1215, the barons and the King met at Runnymede and, in the meadow, compromised their differences and agreed to terms which were outlined in the Articles of the Barons to which the King's Great Seal was attached on June 15, 1215. The settlement which was reached was condemned by Pope Innocent III. He alleged that the Charter was exacted by extortion. However, fortunately for us and for the history of common law rights, King John met an early death in October 1216. So the Charter survived, and it remains a remarkable document even to this day.<sup>2</sup>

The Charter goes far beyond what was needed to resolve the immediate dispute between King John and his barons. It was intended to govern relations between successive kings and their most powerful subjects forever. It binds the Crown even today. Its long title indicates that it is "[t]he great Charter of the Liberties of England."<sup>3</sup> It addresses, "all free men of our Kingdom," and grants them "for ever all the liberties written out below, to have to keep for them and

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1. The English circuits are no doubt precedents for dividing the U.S.A. into different circuits.

2. HENRY MARSH, *BRITISH DOCUMENTS OF LIBERTY* 39-54 (First American ed., Associated Univ. Presses 1971).

3. The Petition of Right art. III (1628), in MARSH, *supra* note 2, at 107.

their heirs, of us and our heirs.”<sup>4</sup> So while the settlement was made with the barons, the class which it purported to protect was much wider. As this was still feudal England, the rights protected were those of “all free men” as broad a category as was conceivable at that time.

As you would expect, in view of its background, in the Charter, pride of place is given to placing restrictions on the King’s ability to abuse his position by extracting extortionate taxes. However, the Charter also protected heirs who, while under age, were under the King’s control. King John had treated their inheritance as his own. However, under the Charter they were to have their inheritance “without ‘relief’ or fine,” and they should receive their land properly maintained and stocked.<sup>5</sup> There was not to be the inheritance tax which is now imposed in the United Kingdom.

The medieval attitude towards women was not that of which we would approve today. However, again, the language of the Charter is remarkably liberal in relation, for example, to widows. The practice had been to treat them as in the King’s custody so their land would come under his control. If the King was short of money, he would auction off widows for marriage to the highest bidder. One noble lady who had been widowed and married three times was prepared to pay the King’s demand of £3000 to escape being married a fourth time.<sup>6</sup> In contrast with this treatment, the Charter provided that widows were to have their “marriage portion and inheritance at once and without trouble.”<sup>7</sup> What is more, no widow was to be compelled to marry “so long as she wishes to remain without a husband.”<sup>8</sup>

Even if a widow did want to marry, the marriage could be a lonely one.<sup>9</sup> King John expected members of his court to dance attendance upon him unencumbered by their wives. One wife, apparently frustrated by this practice, offered John 200 chickens to enable her husband to spend one night at Christmas with her. John accepted.<sup>10</sup> I hope that this was a worthwhile investment.

The provisions I have already cited, you may agree, are remarkable for a document negotiated 790 years ago, but they diminish into insignificance when compared to the chapters dealing with the individual’s rights to justice. Here I will let the articles speak for themselves. I use their original chapter numbers:

20. For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but

4. MAGNA CARTA ch. 1, in MARSH, *supra* note 2, at 41.

5. MAGNA CARTA chs. 3, 5, in MARSH, *supra* note 2, at 41-42.

6. As recounted by Lord Phillips in a speech on Magna Carta. Rt. Hon. Lord Phillips of Worth Matravers, Master of Rolls and Chairman, Magna Carta Trust, Address to the Pilgrims of the United Kingdom (Nov. 2003), *available at* <http://www.magnacharta.org/Pilgrims03.htm> [hereinafter Lord Phillips Address].

7. MAGNA CARTA, ch. 7, in MARSH, *supra* note 2, at 42.

8. MAGNA CARTA, ch. 8, in MARSH, *supra* note 2, at 42.

9. Lord Phillips Address, *supra* note 6.

10. *Id.*

not so heavily as to deprive him of his livelihood.

38. In future no official shall place a man on trial upon his own unsupported statement, without producing credible witness to the truth of it.

39. No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.

40. To no one will we sell, to no one deny or delay right or justice.

45. We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well.<sup>11</sup>

These are the chapters at the heart of Magna Carta.<sup>12</sup> They justify treating Magna Carta as a document of outstanding importance. They, together with the other provisions of Magna Carta, contain many of the core features of the numerous countries around the globe that today adhere to the rule of law. They became part of the core principles of both our countries' common law inheritance and explain why Professor White, Justice O'Connor, and other members of the ABA took part in the rededication ceremony in 2000 at Runnymede.

In Britain, Magna Carta has not always had the public appreciation to which it was entitled, but then Prime Minister Sir Anthony Eden assessed its importance in terms which I would endorse:

The 15 June 1215 is rightly regarded as one of the most notable days in the history of the world. Those who were at Runnymede that day could not know the consequences that were to flow from their proceedings. The granting of Magna Carta marked the road to individual freedom, to Parliamentary democracy and to the supremacy of the law. The principles of Magna Carta, developed over the centuries by the Common Law, are the heritage now, not only of those who live in these Islands, but in countless millions of all races and creeds throughout the world.<sup>13</sup>

If you live in countries such as ours, it is all too easy to be complacent about our freedoms. We cannot afford this. Complacency also probably explains the United Kingdom's approach to the European Convention of Human Rights ("ECHR"). The Convention is based on Magna Carta principles, but it was not until the year 2000, fifty years after it was ratified by the U.K., that the ECHR

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11. MAGNA CARTA, in MARSH, *supra* note 2, at 44-47.

12. They set out the sense, rather than the actual words, of the original Latin.

13. Letter from Prime Minister Rt. Hon. Sir Anthony Eden to the Inaugural Meeting of the Magna Carta Trust (Oct. 1956).

was expressly made part of our domestic law. This meant that we then had, for the first time, a document in addition to Magna Carta that was equivalent to the U.S. Bill of Rights. This did not mean that the United Kingdom had not previously adhered to the rule of law. A.V. Dicey, in *Introduction to the Study of the Law of the Constitution*, was adamant that the British Constitution is founded on the rule of law.<sup>14</sup> However, the nature of the requirement to act in accordance with the rule of law is not precise. It is clear it goes beyond merely requiring everything to be done according to law.<sup>15</sup> It is this to which Lord Justice Laws referred in an article, *Law and Democracy*, when he indicated, contrary to the then general assumption based on Parliamentary Sovereignty, that there has to be limits on our Parliament's power to abolish fundamental freedoms.<sup>16</sup> This is because if the power of Parliament is in the last resort absolute, as Lord Justice Laws stated, "such fundamental rights as freedom of expression are only privileges, no less so if the absolute power rests in an elected body. The by-word of every tyrant is 'my word is law'; a democratic assembly having sovereign power beyond the reach of curtailment or review may make just such an assertion and its elected base cannot immunise it from playing the tyrant's role."<sup>17</sup>

## II. THE DEVELOPMENT OF THE JUDICIAL ROLE

The change in the approach to the supposed principle of the sovereignty of our Parliament, which was generally accepted until fairly recently, is part of the explanation as to why the role of the English judiciary has been transformed during my judicial lifetime (which has entered its twenty-eighth year).

Until the 1970s, the judicial role had hardly changed in over a century. A judge's concern was to decide cases, but little more than that. The general attitude to reform was encapsulated in the oft-quoted remark by a judge of the previous century: "reform, reform, do not talk to me of reform; things are bad enough already." Trials were conducted almost exclusively orally and were extremely adversarial. Rumpole of the Old Bailey was not entirely a figment of a barrister author's vivid imagination. Such advocates could then be readily identified at the English bar. However, today oral advocacy has a lesser role, and written advocacy has become far more significant. Consequently, there is less scope now for the development of the eccentricities which were a part of the

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14. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 187 (The Macmillan Press Ltd. 10th ed., 1973) (1885).

15. In a case before the Hong Kong Court of Final Appeal, *Leung Kwok Hung & Others v. Hong Kong Special Admin. Region*, [2005] 3 H.K.L.R.D. 164 (C.F.A.), the Court, presided over by Chief Justice Li, said "Hong Kong's tradition of fundamental rights and freedoms took root long before the Bill of Rights was enacted and entrenched in 1991." *Id.* ¶ 130. (The Chief Justice was referring to Hong Kong's Bill of Rights.) The same statement is equally applicable to both our jurisdictions.

16. Sir John Laws, *Law and Democracy*, [1995] PUBLIC LAW 72 at 4.

17. *Id.*

flamboyant character of many celebrated advocates in the past. However, the changes in the judicial role, upon which I want to focus today, are even more significant than the changes that have taken place to the bar. Just as the common law has been evolving with increasing rapidity, so has the role of the common law judge. The judge's responsibility for delivering justice is no longer largely confined to presiding over a trial and acting as a neutral arbiter between the conflicting positions of the claimant and the defendant or the prosecution and the defence. The role of the judiciary, individually and collectively, is to be proactive in the delivery of justice. They have to be prepared to take on new responsibilities in order to contribute to the quality of the justice system.

### III. THE NEW JUDICIAL RESPONSIBILITIES

At the forefront of these new responsibilities is achieving access to justice for those within the judge's jurisdiction. They include ensuring the observance of the rule of law by public bodies and the upholding of human rights. The responsibilities also have an international dimension, a dimension that I wish to stress. Chief Justice Murray Gleeson of Australia made reference to these new responsibilities in his admirable speech, *Global Influences on the Australian Judiciary*, at the 2002 Australian Bar Association Conference, when he said:

In an open society, a nation's legal system, and its judiciary, will always be exposed to international influences. Even when unrecognised, or unacknowledged, they will be reflected in the substantive and adjectival law applied by judges, in the structure and status of the judiciary, and in its relationship with the other branches of government.<sup>18</sup>

The judiciary, to which I am referring here, are not the judiciary of the growing number of international and super-national courts and tribunals that are being established in different parts of the world. This is not because I do not support the contribution those courts and tribunals are making towards upholding the rule of law. On the contrary, I recognise that their contribution is critical. For example, the long-established International Court at the Hague, the European Courts of Justice and of Human Rights, the new International Criminal Court, and the Special Court for Sierra Leone deserve our strongest support. We should provide that support by ensuring that international courts are properly resourced and are supplied with judges to serve upon them of the highest calibre from amongst the legal communities of all developed legal jurisdictions, and wherever practical, from amongst their own judiciaries.

Rather than to the members of international courts and tribunals, I am referring to the judiciary who day by day in many jurisdictions are responsible for providing justice to members of their public. All judges in every jurisdiction are, by the way they undertake their domestic responsibilities, contributing to the

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18. Murray Gleeson, Chief Justice of Australia, *Global Influences on the Australian Judiciary*, Address at the Australian Bar Association Conference (July 8, 2002), available at [http://www.hcourt.gov.au/speeches/cj/cj\\_global.htm](http://www.hcourt.gov.au/speeches/cj/cj_global.htm).

quality of justice internationally. Today, no country is cocooned from its neighbours. Human beings do not live in hermetically-sealed containers. While we remain citizens of our individual nations, what happens in any part of the globe can affect us all. We not only have a global economy, we are part of a global society. As Severe Acute Respiratory Syndrome (“SARS”), avian flue, and mad cow disease have dramatically demonstrated, the health of any nation can be at risk if an infection afflicts any other nation. The same can be true of justice and the observance of the rule of law. The process may be slower, and the rate of contagion not so high, but the spread of infection from one legal system to another is likely to be unstoppable unless a cure for the disease is found.

Terrorism and crime are no respecters of national borders. It is not countries which are subject to the rule of law which are the primary breeding ground of terrorism. Though, as recent events have demonstrated, even a country, such as my own, can have its home grown terrorists. Still it is usually where the rule of law has broken down that terrorism takes root. Crime, including terrorism, thrives where law enforcement is weakest. It is no accident that the citizens of countries which observe the rule of law do not have to seek asylum.

The observance of the rule of law is critical to progress in both the under-developed and developed worlds. The rule of law, based as it is on ECHR values, is the key which can unlock greater economic and ethical wealth. The problems confronting the different nations are far from identical. However, if real progress is to be achieved, it is necessary to improve the observance of the rule of law in every part of the globe.

James Wolfensohn the former president of the World Bank was very conscious of this. Amongst the things he said were: “[What] we know is absolutely critical . . . is that you have to have a legal and judicial system which functions equitably, transparently, and honestly. If you do not have that form of legal and judicial system, there is absolutely no way that you can have equitable development.”<sup>19</sup> And of Africa: “it needs strong, well-established rule of law regimes to enable it to trade itself into prosperity and out of poverty.” This partly explains why I believe that the way in which the rule of law is administered by a judge in one jurisdiction either contributes to, or detracts from, the observance of the rule of law generally. Without taking away from the importance of this central thesis, a judge can, and English judges do, make an indirect contribution to the improvement in standards of justice in other jurisdictions as well as their own. An example of the type of contribution to which I am referring is that which the judiciary makes by commenting on the jurisprudence of other jurisdictions when it gives judgment. This is particularly true in the field of human rights because those rights represent international norms.

One of the reasons why I am personally enthusiastic about the ECHR having been made part of our domestic law is that it enables the judges in my jurisdiction, in the ordinary course of their duties of trying domestic cases, to make a contribution that previously would not have been possible. By their

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19. James D. Wolfensohn, President, World Bank Group, Empowerment, Security and Opportunity Through Law and Justice, Address in St. Petersburg, Russia (July 9, 2001).

decisions in ordinary cases, they contribute to the evolving international jurisprudence of human rights. In the past, British judges could do this in the Privy Council which used to be the final court of appeal for one third of the nations of the world. However, most of the Privy Council's post-colonial jurisdiction have now been repatriated, so today this provides limited opportunities. As a member of the Privy Council, I had a limited exposure to the human rights jurisprudence of the countries which were then subject to constitutions that contained human rights codes, but not nearly to the extent I now have as a result of the ECHR becoming part of our domestic law. The additional exposure of our judiciary is of particular importance because, until the ECHR became part of our domestic law, there was no common law jurisdiction which directly gave effect to the ECHR in its courts. The Republic of Ireland had its Bill of Rights, of course, and has done an admirable job in keeping the common law flag flying in Europe, but its contribution to human rights has been largely based on its own constitution.

Another opportunity of benefiting from the judicial exchange of views, the value of which I can vouch for personally, are those that now take place with increasing frequency at meetings between the judiciary of two or more jurisdictions. I know, for example, that some of my judgments have been influenced by the exchanges I have had with my colleagues from the U.S.A. I have also been made aware of possibilities that otherwise I would not have conceived were viable by the proactive approach of the Indian Supreme Court. I say straight away, its approach would not always be appropriate in either the U.K. or, I suspect, in the U.S.A., but in India it is seen by the Indian Supreme Court as being essential because of the Court's unique role in Indian society. For example, Justice Singh, who is now retired, certainly surprised me when he explained how he had come to make the particular order that he made on a day I visited him. He had read of a disturbing incident in his home State of the Punjab, so, on his own initiative, he went into court and ordered the local court to investigate and report back to him. He felt he had no option but to adopt this course because if he had not acted the incident may not have been investigated. I congratulated him for the initiative he had shown, which was no doubt justified in India due to the lack of alternatives, but such summary action could not be justified in the U.K.

Another recent and relevant example was provided by Chief Justice Barak of Israel in a lecture he gave in London. He held a distinguished British audience riveted for over an hour. His punch line was while considerations of security are important and relevant to a judge's decision in cases involving national security, as in any other case, judges still have the responsibility of upholding the rule of law. So even to detect the whereabouts of a ticking bomb, torture cannot be justified. In both our countries we have had to face the same responsibilities as the Israeli Supreme Court. Naturally, our senior judges have watched the decisions of your senior courts with interest, as your judges have no doubt been watching our courts' decisions. Immense though the difficulties which our judges face are, they do not compare with those faced by President Barak and his colleagues on the Israeli Supreme Court. Against the background of one terrorist incident after another, that court has made courageous decisions. In addition to

their ticking bomb decision, the Court has ruled upon the lawfulness of erecting a wall that will divide communities. In both cases, the way in which that Court came to its decision by applying established judicial principles and techniques was hugely impressive. You need to be a judge who has had to wrestle with this type of decision to fully recognise the quality of the decisions made by Chief Justice Barak and his Court.

I believe we have a responsibility to learn from each other not only in regard to substantive law, but also in relation to practice and procedure. When considering procedural reforms of our legal systems, it would be a foolish jurist who did not look at the experience overseas. I certainly did so for my report on Access to Justice and, as you would expect, I received most generous assistance wherever I turned—in particular, from the different jurisdictions in the U.S.A.<sup>20</sup>

Another benefit that can result from judicial exchanges is an improvement in international judicial cooperation. Sometimes this can be achieved by establishing international conventions. Such an approach is ideal if everyone is willing to participate and agree. Then, the judiciary's role can be limited to merely providing advice on what would be the most appropriate form for the convention to take. However, there can be a particular reason for a country not being prepared to join a convention, even though there is a real need for practical cooperation between two jurisdictions. When this happens, we have found that the judiciary can themselves, through direct contact, achieve what may be necessary.

In the U.K. we now have a substantial Pakistani community. In the past, there have been difficulties because of the lack of a convention to which Pakistan is a party to regulate the situation when a marriage breaks up and a parent takes a child back to Pakistan. Until recently, there was no simple process of obtaining the return of the child. The court procedures could be slow and ineffective, causing the parent who was deprived of the child considerable anguish. Fortunately, a solution was found. The President of our Family Division made a visit to Pakistan, and a delegation of Pakistani judges made a return trip to England. Because of this exchange, a protocol was established between the two judiciaries on their own initiative. The protocol provided that, in the absence of special reasons, a child would be returned to its former country of residence so that issues as to care could be dealt with by the courts of that country. To ensure the smooth operation of the protocol, each country identified a senior judge to supervise the smooth operation of the protocol and to act as a liaison point if any difficulties should arise. My informant tells me that the protocol is working well with considerable benefit to the children involved. There are plans to replicate the model with other countries that are not parties to the Hague Convention.

Another example is provided by the arrangement which exists between France and the U.K. to achieve better judicial cooperation in relation both to criminal and civil matters. Each country now sends a liaison judge to the other country to facilitate cooperation between the two legal systems. This has made

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20. RT. HON. LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT (1996), *available at* <http://www.dca.gov.uk/civil/final/index.htm>.

a significant contribution to an improved understanding between the two jurisdictions, one of which is, of course, civil and the other common law. We have realised that, not only do we have much to learn from other common law systems, but also from the civil systems.

I regard it as important that, where we can, we harmonise our legal systems, again not only with other common law jurisdictions, but also with civil jurisdictions. In this regard, it is without doubt true that the European Union and the ECHR are acting as catalysts. This is not, as is sometimes suggested, to the disadvantage of the historic links with other common law jurisdictions. In fact, it enables us to bring added value to our interchanges—perhaps a continental flavour. Our civil procedure is now much closer to that of the French. As I like to describe it, our system is situated somewhere in the middle of the English Channel.

I turn now to what is becoming increasingly part of the role lawyers, including judges, play. This is a responsibility which is *primarily* that of well established legal systems, though it can be of benefit to all. The responsibility is to provide support when it is needed to other legal systems. The position, as I see it, is as follows. Legal systems of different jurisdictions are dependant upon each other. The standards which exist in one legal system can have an influence on the standards of other systems. Their ability to do this is influenced by the standards that they set in their own legal systems. Individual judges and lawyers have in the past, and I hope this will continue in the future, made significant contributions to other jurisdictions, especially in enhancing the observance of human rights.

In this regard, it is with hesitation that I point out that even in the United States there can be a need for assistance. I would suspect most lawyers would be prepared to agree that there is a lack of legal resources for those languishing on death row that is regrettable. So I am especially proud of the work done *probona* by the English bar and solicitors to help to obtain justice for those on death row in the United States.

Other examples of judicial cooperation also exist. Members of the Australian and New Zealand judiciary go and sit in the small jurisdictions in the Pacific area which do not at present have the resources to provide the quality of justice that they themselves would wish to provide from amongst their own citizens. The United Kingdom is, I believe, the only jurisdiction providing judges prior to retirement to sit on the Final Court of Appeal in Hong Kong (although Australia and New Zealand provide very distinguished retired members of their judiciary). In this way it is ensured that the standards of justice that existed prior to China regaining sovereignty over Hong Kong continue. Additionally, the Special Court of Sierra Leone has amongst its judges a number of judges of other African States. These examples should be precedents for other smaller jurisdictions to follow. If they extend an invitation to an overseas judge to sit on their Court, the presence of that judge demonstrates that the jurisdiction has a judiciary that has the necessary quality and independence, by a method which is not inconsistent with national pride—which was a real disadvantage of appeals to the Privy Council in London.

In addition, I am sure we could do more to help each other by providing training. The training of judges needs to be in the control of judges from the

country concerned, but judges from other jurisdictions can provide assistance when required. I know a great deal of valuable assistance is being provided already by and to different jurisdictions. I am particularly impressed by the contribution being made by Australia's Federal Court to the Indonesian judiciary and was extremely grateful to Chief Justice Michael Black for allowing me to witness the 'graduation ceremony' for the members of the Indonesian judiciary who most recently completed a training course in Australia. For the new democracies of Eastern Europe, whose judicial and legal systems are still recovering from the cold war days, there are already many similar programmes in place. Many of these programmes are supported by United States judges and lawyers as well as judges from other jurisdictions. Outstanding among the U.S. judges is an ageless appellate judge who has taken senior status and, who, in many undeveloped countries, is a byword as a source of constructive advice. He is the Honorable Clifford Wallace, who has worked tirelessly (you could not work harder) to improve the standards of justice throughout the world. He has made a suggestion that I would warmly endorse. He suggested that each developed jurisdiction should pair up with one of the jurisdictions of the emerging democracies to mentor that jurisdiction for as long as necessary. I believe he had very much in mind the precedent of the relationship between Indonesia and the Federal Court of Australia to which I have already referred. He would welcome volunteers.

It should not be thought that the benefits of such programmes are not reciprocal or that it is only small countries that have need of assistance. I have had the good fortune relatively recently to visit three large jurisdictions—much larger than my own—at particularly opportune times. In each case, I have witnessed the start of a process of change prompted by those countries realising that adherence to the rule of law is of critical importance to their future development.

The first country was South Africa, which I visited in 1994 soon after Mandela had been released. I went to Bloemfontein with three colleagues for a conference on human rights at the South African Court of Appeal presided over by their Chief Justice. The conference was between the judges of South Africa and the judges of other African jurisdictions. We met for the first time in the library of the Court—the visiting judges (most of whom were black) were in their lounge suits and the white judges of South Africa in their black robes. Initially the two groups stood apart, but then merged and started to talk avidly. From that meeting, I believe, grew the tree which now flowers as one of the world's great courts, the Constitutional Court of South Africa.

The second country was China. I made two visits about sixteen years apart. The change was dramatic, brought about, I believe, by exposure to foreign legal systems. On the first visit, although the Vice President (who was head of the Supreme Court) was interested in the western legal systems, he had no conception of how a legal system could operate. On the second visit in 2001, there was a hunger for advice so as to develop a system of justice which would support China's growing trade. I again visited last September, and I was astonished by the progress that had been made.

The final country was Russia. The World Bank held a conference there last

year on reforms of legal systems. As a result of the visit, I was convinced that Russia was committed to adherence to the rule of law. Although the conference was due to be opened by President Putin, he could not attend. I was one of a privileged few flown in his private jet to meet him in Moscow at the Kremlin. I was astonished to find that this was not a private meeting, but it was to be broadcast on Russian television. I had been told that the President would welcome a question on human rights, and the question I posed on capital punishment certainly received a positive response.

But to return closer to my chosen subject. A case in the United Kingdom which I believe demonstrated a defining realisation of the importance of the interactive responsibilities of our different judiciaries was provided by the General Pinochet litigation. Omitting the reasons for the two hearings or the appeal, I believe the result of the case sent a strong message as to how different jurisdictions, Spain and the United Kingdom, could require even one of the most powerful citizens of another state to return home to be held accountable for his possible guilt of crimes against humanity.

My Scottish colleagues have recognised the need to be innovative in order to overcome geographical hurdles to achieve justice. I refer to their response to the Lockerbie terrorist incident. The decision to sit in a Scottish enclave in Holland was a remarkably imaginative way of enabling justice to be achieved for the relatives of the victims on the flight which happened to be passing over Scotland at the time the bomb exploded.

The fact that challenges posed by novel situations of this nature can be overcome makes the judicial role today so rewarding. Novel solutions are achievements for the jurisdictions involved, but more importantly, they contribute to the accumulated experience across all jurisdictions. If it has been done once, it can be done again. These contributions result in the reach of the rule of law extending more rapidly today than ever before.

We must not, however, be complacent. In recent years, there have been deeply worrying threats to the independence of the judiciary in some jurisdictions. Commendably, in a few other jurisdictions, and particularly in South Africa, the senior judiciary have publicly joined the protest of the United Nations rapporteur, politicians and the media. Others have, in private, provided support. However, it could be helpful if, in these situations, the collective voice of, say, the chief justices could be heard. But how could this be done? There is no organisation of chief justices in existence at present to take on this responsibility.

After much thought, I have come to the conclusion that it is doubtful whether such an organisation is practical or even possible. The need is intermittent, but when it arises, it is urgent. There is a regular turnover in those who hold the office of chief justice. It is most unlikely that any general mandate could be given without a meeting of those in office at the relevant time. Opinions could differ because the nature of the problems differ. Any intervention could be seen as being unjudicial. Despite this, certainly the desirability of finding an answer requires this issue to be on the agenda.

## CONCLUSION

I appreciate that I have travelled over a vast amount of territory in course of this talk. So much so that I am reminded of a vacation job I had when I was attending University more than fifty years ago. I was a courier for thirty U.S. students, mainly girls, who were travelling around Europe for the first time. In the course of a few weeks we went to about fifteen countries in about thirty days. We could not get more than a taste of the countries we visited. However that taste was enough to convince us that we would all benefit greatly from returning to each of those countries because we still had much to learn. I am convinced that the position is very much the same with judges of different legal systems. No one jurisdiction has a monopoly on truth and when the judiciaries in so many jurisdictions are facing unprecedented challenges, we need all the help we can get.



## NOTES

### A NEW ENERGY PARADIGM FOR THE TWENTY-FIRST CENTURY: CHINA, RUSSIA, AND AMERICA'S TRIANGULAR SECURITY STRATEGY

JUSTIN W. EVANS\*

#### I. OVERVIEW: WHAT AMERICAN LAW MUST STRIVE TO ACCOMPLISH

##### *A. Introduction: Oil as the World's Blood*

This Note briefly surveys the nature of international affairs and the importance of energy to the success of nations. It suggests a broad strategy for American law to pursue in maximizing the security and affluence of the United States during the rise of the next great power, China, throughout the twenty-first century.

A variety of factors determine the relative power and influence of nations. One of the most fundamental necessities for building a successful society is energy.<sup>1</sup> An inexpensive supply of energy fuels a nation's economy, defense, and quality of life. Several fine definitions of "energy security" have been proposed. Among the best is the meaning provided by the U.S. Energy Association:

Energy security is a multi-faceted issue. In its most fundamental sense, energy security is assured when the nation can deliver energy economically, reliably, environmentally soundly and safely, and in

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1. As the U.S. Energy Association notes,

[e]nergy is not an end in itself, but rather is a means to achieve the broader goals of sustainable development generally, and economic growth, specifically. . . . Failure to provide reliable energy services in a comprehensive and integrated manner inhibits entrepreneurs and serves as a brake on economic growth and private investment.

U.S. ENERGY ASS'N, TOWARD AN INTERNATIONAL ENERGY TRADE AND DEVELOPMENT STRATEGY 29-30 (2001), available at <http://www.usea.org/T&Dreport.pdf>.

quantities sufficient to support our growing economy and defense needs. To do so requires policies that support expansion of all elements of the energy supply and delivery infrastructure, with sufficient storage and generating reserves, diversity and redundancy, to meet the demands of economic growth.<sup>2</sup>

The reality today is that “oil” remains fundamental to “energy.” Those nations that wish to excel need oil, and those that possess it have influence. Oil, therefore, is *power*.<sup>3</sup>

Since the collapse of the Soviet Union, America’s policymakers have correctly come to identify energy with national security.<sup>4</sup> One scholar notes that “[w]hereas, in the past, national power was thought to reside in the possession of a mighty arsenal and the maintenance of extended alliance systems, it is now associated with economic dynamism and the cultivation of technological innovation.”<sup>5</sup> This shift does not mean that military force is becoming obsolete; indeed, quite the opposite is true. A sound economic system is required for a nation to afford an effective military; an effective military, in turn, is necessary to defend a nation’s interests—including the nation’s supply of the inexpensive energy that fuels its economy.<sup>6</sup> Not surprisingly, other nations today (including China) are shifting their mindsets and strategies to the critical importance of energy supplies, the so-called “*economization* of international security affairs.”<sup>7</sup> Nationalism and territoriality still persist; therefore, “energy security for all must be managed carefully lest other pathologies spread into deliberations in the energy area.”<sup>8</sup>

Given the critical importance of energy to the future of every country, the current and projected states of petroleum are troublesome. The world’s supply of recoverable oil is diminishing as demand continues to rise. Some estimates—including those based upon the well-known Hubbert’s Curve—predict that the world has already reached the midpoint of recoverable production and that half or more of all recoverable oil has already been extracted.<sup>9</sup> The U.S. government’s Energy Information Administration claims

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2. U.S. ENERGY ASS’N, NATIONAL ENERGY SECURITY POST 9/11, at 7 (2002), available at <http://www.usea.org/USEAReport.pdf>.

3. See generally DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER (1991). On the significance of power, see also *infra* note 24.

4. MICHAEL T. KLARE, RESOURCE WARS 5-10 (2001).

5. *Id.* at 7.

6. *Id.* at 6, 9-10.

7. *Id.* at 10.

8. Amy Jaffe, *The Growing Developing Country Appetite for Oil and Natural Gas*, 9 ECON. PERSP. (U.S. DEP’T OF STATE) 13, 13 (2004), available at [http://www.ciaonet.org/olj/ep/ep\\_may04/ep\\_may04d.pdf](http://www.ciaonet.org/olj/ep/ep_may04/ep_may04d.pdf) (subscription required).

9. See *The Hubbert Peak for World Oil, Summary*, <http://www.hubbertpeak.com/summary.htm> (last visited May 18, 2006).

that world oil production will peak around 2037.<sup>10</sup> This estimate, however, is based upon several speculative assumptions,<sup>11</sup> and even though its “analysis shows that [the global production midpoint of petroleum] will be closer to the middle of the 21st century than to its beginning,” the authors concede that “this result in no way justifies complacency about both supply-side and demand-side research and development.”<sup>12</sup> Indeed, one can manipulate estimates of the global production peak depending upon which sets of data are used, which statistical models are employed, and what kinds of assumptions are made. For example, the ecosystems model<sup>13</sup> includes one curve peaking around 2020,<sup>14</sup> but that curve “assumes a price leap when the share of world production from a few Middle East countries reaches 30%.”<sup>15</sup>

In sum, even the most optimistic estimates concede that the world’s petroleum production capacity is almost certain to peak within the next thirty years or so; less optimistic estimates predict that the curve has already peaked. In any event, the supply of petroleum is declining and will likely have surpassed more than half of the recoverable total by about 2035. In the near future, the amount of the global petroleum supply makes it highly likely that the United States and other nations will find it increasingly difficult to continue to assure their supplies of oil. Given the critical importance of oil, it is also likely that *as recoverable supplies continue to decline, nations will compete for those scare resources with increasing intensity.*<sup>16</sup>

At the same time the global supply of recoverable oil is declining, demand for the product is rising at a furious rate and will continue to do so.<sup>17</sup> The United States is by far the world’s top demander of oil, consuming nearly four times as

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10. JOHN H. WOOD ET AL., U.S. ENERGY INFO. ADMINISTRATION, LONG-TERM WORLD OIL SUPPLY SCENARIOS: THE FUTURE IS NEITHER AS BLEAK OR AS ROSY AS SOME ASSERT 5 (2004), available at [http://www.eia.doe.gov/pub/oil\\_gas/petroleum/feature\\_articles/2004/worldoilsupply/pdf/itwas04.pdf](http://www.eia.doe.gov/pub/oil_gas/petroleum/feature_articles/2004/worldoilsupply/pdf/itwas04.pdf).

11. *Id.* Among other factors, the study assumes an average of two percent production growth until the peak and a production decline at a reserves-to-production ratio of ten. *Id.* Although it is beyond the scope of this paper to debate the scientific merits of this study’s chosen estimates, it is sufficient to note that the estimates are just those—estimates—and that many other credible scientific studies (including the Hubbert Peak, *supra* note 9) give less optimistic projections about the precise timing of the peak.

12. *Id.* at 7 (emphasis omitted).

13. See *supra* note 9 and accompanying text.

14. See *supra* note 9 (noting the “Swing Case”).

15. *Id.*

16. See also *supra* notes 4-7 and accompanying text. See generally KLARE, *supra* note 4.

17. The Energy Information Administration, for example, estimates that global oil consumption will increase by 1.9% per year through 2025, from 77 million barrels per day in 2001 to nearly 121 million barrels per day in 2025. U.S. ENERGY INFO. ADMIN., INTERNATIONAL ENERGY OUTLOOK 2004, at 2 (2004), available at [http://tonto.eia.doe.gov/FTP/ROOT/forecasting/0484\(2004\).pdf](http://tonto.eia.doe.gov/FTP/ROOT/forecasting/0484(2004).pdf).

much as the next country in 2001.<sup>18</sup> Experts expect America's petroleum demand to increase by an average of 1.5% per year through 2025, at which point the United States will consume 28.3 million barrels per day.<sup>19</sup> This large consumption of oil by Americans is particularly vexing given the importance of the Middle East to the world's oil supply and the tenuous political, economic, and social environment which that region of the world now occupies.<sup>20</sup>

Complicating the demand picture further is the rise of China. In 2003, China became the world's second-largest consumer of oil after the United States and already is "a significant factor in world oil markets."<sup>21</sup> Like the United States, China "is focused on meeting domestic demand."<sup>22</sup> As China's economy continues to grow, its demand for oil will continue to grow as well.

To summarize, the global supply of recoverable oil is shrinking. Because an increasing proportion of the world's supply is expected to come from the politically troubled Middle East, nations have an incentive to diversify their oil suppliers. Although it is impossible to pinpoint the precise moment when the world will exceed its production peak, most reliable estimates predict that the peak will be surpassed by roughly 2035, and some estimates claim that the world has already surpassed its peak production. Although the world's capacity to recover oil is irreversibly declining, global demand for oil is growing and will continue to do so. Specifically, America's demand will reach new heights, far outstripping the degree of dependence other nations have on petroleum. Simultaneously, China's thirst for oil will grow, closing the demand gap with the United States as the twenty-first century progresses. Although alternative energy technologies and domestic initiatives such as conservation are crucial, these attempts to curb the need for petroleum currently show little promise of significantly reducing dependence upon oil in the next half-century.

### *B. Implications for the United States*

#### *1. Offensive Realism: Why Nations Act as They Do.*—Several competing

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18. CIA, *The World Fact Book: Rank Order—Oil—Consumption*, <http://www.odci.gov/cia/publications/factbook/rankorder/2174rank.html> (last updated Jan. 10, 2006).

19. U.S. ENERGY INFO. ADMIN., *supra* note 17, at 30. Thus, America will demand 28 million barrels per day out of the total global consumption of 121 million barrels per day in 2025, or roughly twenty-three percent of the world's available supply.

20. Providing yet another compelling incentive for the United States to diversify its petroleum sources, the Middle East is expected to supply a still greater proportion of the world's oil as the twenty-first century progresses. Consequently, "[s]hort-term risks to energy security are expected to increase in coming decades as a greater share of oil and gas supplies come from politically sensitive areas." Kevin Morrison, *World to Become More Dependent on Mideast Oil*, *FIN. TIMES* (U.K.), Oct. 27, 2004, at 6.

21. U.S. ENERGY INFO. ADMIN., *COUNTRY ANALYSIS BRIEFS: CHINA 1* (2005), available at <http://www.eia.doe.gov/emeu/cabs/china.pdf> [hereinafter U.S. ENERGY INFO. ADMIN.: CHINA].

22. *Id.* at 4. Otherwise stated, China is focused on ensuring the continuation of its oil supplies from abroad.

theories seek to describe the incentives and actions of nations in the international context. The theory that most closely underlies the assumptions of this Note is popularly termed “offensive realism.”<sup>23</sup>

The most fundamental concept to the theory of offensive realism is that of *power*.<sup>24</sup> Nations pursue power, usually at the expense of each other, because in an anarchic system of international affairs, there is no authority to protect states from one another. Power is the best way to ensure survival, and the incentives created by international anarchy oftentimes encourage proactive behavior.<sup>25</sup> Unlike other variants of realism, offensive realism rejects the notion that nations remain stagnant or seek to embrace the status quo, because “the international system creates powerful incentives for states to look for opportunities to gain power at the expense of rivals, and to take advantage of those situations when the benefits outweigh the costs.”<sup>26</sup> Nations, then, are constantly looking for ways to better secure themselves, both by promoting their own strengths and by undermining the strengths of surrounding states. A state’s ultimate goal is to become the dominant power in its region, so strong that no other state can credibly threaten its well-being. Such a state is called a “hegemon.”<sup>27</sup> Hegemons maximize their economic opportunities and secure those opportunities to the greatest extent possible, usually through an intimidating military force. Because technology and affluence are “shrinking” the world, making it possible for still more distant states to threaten and harm each other, policymakers must bear this dynamic in mind while formulating America’s security strategy.

Although it is not the purpose of this Note to debate the merits of competing theories of international politics, it is necessary to understand the basic assumptions made here if U.S. law is to effectively serve the interests of American society. Consistent with the foregoing, this Note assumes that nations, particularly powerful ones, should, and in fact do, seek to maximize their power both in an absolute sense and, more importantly, relative to other great powers. Although scholars debate which features of power are the most important, it is sufficient here to note that among the most fundamental buttresses of that power is an *inexpensive, reliable source of energy*.

An inexpensive, reliable source of energy makes possible a flourishing economy, technological innovation, and an effective military force. Nations that do not enjoy an inexpensive, consistent energy supply—or the infrastructure to support such a supply—are doomed from the start. To date, no modern nation has pulled itself from the grips of grinding poverty and chaos—let alone maximized its security by becoming a great power—in the absence of a system of inexpensive, reliable energy. In turn, nations that possess economic affluence,

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23. For a supremely well-written discussion on the competing theories of international politics, and of realism in particular, see JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 1-28 (2001).

24. *Id.* at 12. On the significance of power, see also *supra* note 3.

25. MEARSHEIMER, *supra* note 23, at 21.

26. *Id.*

27. *Id.* at 40.

technology, and military power will use some of those resources for reinforcement and expansion. Energy, the underpinning of them all, is no exception.

It is in this context, then, and with these assumptions, that the United States and other countries must consider how to best serve their economic and security interests. Even if the United States and China have no actual hostile ambitions toward the other in the year 2030, the *perception* of each will, by necessity, always be one of competition: it is impossible for a country to ever know with certainty the plans of another.<sup>28</sup> Each, then, will seek to maximize security against the other. Additionally, each nation's search for economic affluence will provide an additional incentive for the other to outpace its fellow power across the Pacific.

2. *China and the United States in the Twenty-First Century.*—China is indisputably becoming a substantial force in its own right.<sup>29</sup> As China's economy grew throughout the 1980s and 1990s, so did its demand for oil; China became a net importer of petroleum in 1993.<sup>30</sup> Now dependent upon the Middle East, China is engaging that region<sup>31</sup> and is as likely as the United States to attempt diversification of its oil suppliers. China is obsessively wary of reliance upon foreign states; this aversion is accentuated still more sharply in the realm of energy, because the government is very much aware of its stake in China's future.<sup>32</sup>

Given the foregoing, one might reasonably anticipate a conflict between China and the United States in some form, militarily or otherwise, within the next half-century; some scholars deem conflict, or at least substantial friction, to be

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28. *Id.* at 31.

29. A variety of measures are used to assess China's growth. Perhaps the most impressive is China's economic prowess: it is now the fourth largest economy in the world, and it is growing at three to four times the rate of the three largest economies. Moreover, China is soon expected to become the largest exporter of capital, acquiring ownership of commercial interests all around the globe. Fareed Zakaria, *What Bush and Kerry Missed*, NEWSWEEK, Oct. 25, 2004, at 58.

30. Daniel Yergin, *Gulf Oil—How Important is it Anyway?*, FIN. TIMES (U.K.), Mar. 22, 2003, at 1. And by 2003, China's oil consumption had doubled from a decade before.

31. As some have pointed out, China's engagement of the Middle East has not always been compatible with American interests. For example, China's "way of forming a footprint in the Middle East has been through providing technology and components for weapons of mass destruction and their delivery systems to unsavory regimes in places such as Iran, Iraq and Syria." Gal Luft, *China's Thirst for Oil Poses a Threat to U.S.*, HOUS. CHRON., Feb. 9, 2004, at A17. This is one example of how fundamentally oil is tied to a variety of different issues—in this case, to terrorism. China is a supplier of weapons to the very region in which the United States is now primarily focused on the war on terror.

32. Toshi Yoshihara & Richard Sokolsky, *The New World Disorder: The United States and China in the Persian Gulf: Challenges and Opportunities*, 26 FLETCHER F. WORLD AFF. 63, 67-68 (2002). As a result of this new awareness, China has moved to diversify its providers of oil. The only other alternative, reduction of total petroleum consumption, is manifestly incompatible with continued economic expansion.

unavoidable.<sup>33</sup> Energy could play two significant roles under such a scenario. First, the two nations would grapple over control of the raw energy supplies themselves, especially petroleum. Oil might initiate a conflict, or the two nations might expand another dispute to include energy supplies. Petroleum, then, would be the *subject* of a quarrel. The second role oil would play in any clash between the United States and China would be to serve as the *means* for waging a conflict. Energy is necessary to power a military; it is also necessary to fuel the society funding a military. The dual nature of oil—as both the catalyst and the enabler of a dispute between America and China—is crucial to appreciating its strategic value.

3. *Enter Russia.*—Barring a miraculous technological breakthrough, the United States and China will continue to demand oil at ever-higher volumes. Each nation would undoubtedly benefit by diversifying its sources of oil.<sup>34</sup> To this end, China has acquired interests in many countries already, the most spectacular recent example of which is its deal with Venezuela.<sup>35</sup> Notes the British Broadcasting Corporation, “[a] lack of sufficient domestic production and the need to lessen its dependence on imports from the Middle East has meant that China is looking to invest in other potential markets such as Latin America.”<sup>36</sup>

To further complicate a potential Sino-American oil conflict, Russia now enters the picture. Just how much oil Russia possesses is a state secret, but estimates from the private sector are frequently revised upward. Russia is the world’s second largest producer and second largest exporter of crude oil after Saudi Arabia.<sup>37</sup> Russia has managed this feat in spite of its struggling economy and the morass that is the post-Soviet legal system.<sup>38</sup>

Although a variety of legal problems continue to depress Russia’s full

33. Mearsheimer is one such scholar: “China cannot rise peacefully, and if it continues its dramatic economic growth over the next few decades, the United States and China are likely to engage in an intense security competition with considerable potential for war.” John J. Mearsheimer, *Better to Be Godzilla than Bambi*, FOREIGN POL’Y, Jan.-Feb. 2005, at 47.

34. U.S. ENERGY ASS’N, *supra* note 2, at 14. The more diversity the United States enjoys in its energy supplies, the less likely a single supply going off-line will bring the American economy and military to a halt. Of course, the same is true for China; hence, it is in America’s security interests that China has minimal diversity amongst its suppliers of oil. In the event of a conflict between the United States and China, it would be easier for the United States to deny China the oil it would require to sustain the conflict if China had few reliable sources.

35. Venezuela has offered the Chinese government access to its oil reserves, which “will allow China to operate oil fields in Venezuela and invest in new refineries.” *Venezuela and China Sign Oil Deal*, BBC NEWS (U.K.), Dec. 24, 2004, <http://news.bbc.co.uk/2/hi/business/4123465.stm>.

36. *Id.*

37. U.S. Dept. of State, *U.S. Cooperating with Russia, Central Asia on Global Energy Security*, INT’L INFO. PROGRAM, May 1, 2003, <http://usinfo.state.gov/gi/Archive/2003/May/29-238097.html>.

38. Incidentally, some commentators have questioned whether Russia will ever have enough recoverable oil to make investment there worthwhile. This Note categorically rejects such claims. See *infra* Part II.C.

potential as a supplier of oil,<sup>39</sup> global demand will soon reach a crescendo.<sup>40</sup> Russia desperately needs economic stimulus and has its own potential crisis brewing with terrorists.<sup>41</sup>

It comes as no surprise, then, that China has pursued Russian oil.<sup>42</sup> Some of China's industrial hubs, including the northeastern city of Daqing, depend *entirely* upon oil imported from Russia.<sup>43</sup> China has gone so far as to raise tensions with Asia's current economic leader, Japan, over a new Russian pipeline.<sup>44</sup> For its part, Russia has, as recently as November 2004, explicitly reassured Beijing that "it can increase rail shipments of oil disrupted in recent months . . . ."<sup>45</sup>

Although some contend that relations between Russia and China remain "ambivalent,"<sup>46</sup> this activity should command the attention and concern of American policymakers. China is doing precisely what the United States should be doing: courting Asia's energy states, particularly China's oil-producing neighbors, and most especially Russia. At least one scholar agrees that "[t]he U.S. government should also take a much more proactive stance vis-à-vis Russia and China with respect to the international energy sector[,] as "[i]t could help . . . these two critical emerging energy powers define their own goals in manners compatible with U.S. objectives."<sup>47</sup> Some observers posit that Russia will someday join the United States in counterbalancing China's hegemonic

39. See also *infra* Parts II-III. See generally Arina Shulga, Comment, *Foreign Investment in Russia's Oil and Gas: Legal Framework and Lessons for the Future*, 22 U. PA. J. INT'L ECON. L. 1067 (2001).

40. See *supra* Part I.A.

41. See, e.g., CNN, *Timeline: Russia Terror Attacks*, CNN.COM, Sept. 1, 2004, <http://www.cnn.com/2004/world/europe/09/01/russia.timeline/index.html>.

42. "The thing to look for over the next year or two," wrote one oil expert in 2003, "is the firming up of plans by Moscow for new pipelines that will carry Russian oil to China or elsewhere in Asia . . . ." Yergin, *supra* note 30, at 1.

43. James Kynge, *Daqing's Nodding Donkeys Have Opened the Gates to Russian Oil*, FIN. TIMES (Asia), Aug. 23, 2004, at 4.

44. Paul Roberts, *The Undeclared Oil War*, WASH. POST, June 28, 2004, at A21. China and Japan have exchanged diplomatic barbs as they compete for a pipeline from—not surprisingly—Russia. *Id.*

45. Mure Dickie, *Russia Reassures China About Increased Oil Shipments*, FIN. TIMES (U.K.), Nov. 27-28, 2004, at 4. Chinese media reported that their government and Moscow "had agreed to work together to 'guarantee' Russia would be able to ship at least 10m tonnes of oil in 2005 and at least 15m tonnes in 2006." *Id.* Similarly, "Russian media have said Lukoil plans to sell 400,000 tonnes of oil to China in the first quarter of [2005]." *Id.*

46. *Courtship in Beijing*, FIN. TIMES (U.S.A.), Oct. 15, 2004, at 12. The article notes that Russia is in the more favorable position "because it has two things—energy and arms—that China badly wants. This puts Beijing in the unusual position of being *demandeur*, in contrast to its relations with the rest of the world which has been hammering on China's door for contracts." *Id.*

47. Jaffe, *supra* note 8, ¶ 25.

aspirations.<sup>48</sup> In the meantime, however, China and Russia are weaving closer ties in an effort to counter America's present geopolitical power; the two nations have even begun joint military exercises.<sup>49</sup> The U.S. government simply has not sought out allies with nearly the degree or the intensity that Beijing has.<sup>50</sup>

*C. One Possible Solution: America's Domestic and Foreign Law*<sup>51</sup>

Some scholars have advocated an American policy of slowing Chinese economic growth.<sup>52</sup> The rationale for this argument is that "[a] wealthy China would not be a status quo power but an aggressive state determined to achieve regional hegemony. . . . Although it is certainly in China's interest to be the hegemon in Northeast Asia, it is clearly not in America's interest to have that happen."<sup>53</sup> It is quite true that as a rival China would likely attempt to assert domination over Asia, and perhaps beyond, and that such an assertion would be patently contrary to America's interests. Slowing China's economy, however, is probably not a realistic option. With interests the world over seeking investment opportunities in China—including very powerful domestic interests in the United States—a voluntary withdrawal from the Chinese market by any one nation is highly unlikely. Not without physically destroying China's economic capacity through armed conflict could the United States realistically hope to slow or stop its escalation. Moreover, growth in the Chinese economy is not *necessarily* contrary to the interests of the United States. The greater the percentage of China's domestic economic power that the United States and other foreign nations own, the better position the United States occupies. In addition, American investment in China will enrich the United States at the same time it enriches China.

Yet it is clear that China, if it were one day capable of doing so, *would* credibly challenge American economic and security interests in Asia and elsewhere.<sup>54</sup> The ideal policy, then, would encourage Chinese participation in

48. See Mearsheimer, *supra* note 33.

49. Reuters, *Russia, China to Expand Military Cooperation*, YAHOO! NEWSINDIA, Sept. 6, 2005, <http://in.news.yahoo.com/050906/137/600rd.html>. Although the two nations will not create a formal military bloc, both have agreed to expand their military cooperation because, according to Russian Defense Minister Sergei Ivanov, "[t]he approaches of Russia and China to all problems of international security either completely coincide, or are almost identical . . . ." *Id.*

50. See Ashley J. Tellis, *A Grand Chessboard: Beijing Seeks to Reassure the World That It Is a Gentleman*, FOREIGN POL'Y, Jan.-Feb. 2005, at 52-54.

51. The phrase "foreign law" is employed here to denote U.S. laws and legal mechanisms aimed at foreign states, e.g., treaties.

52. MEARSHEIMER, *supra* note 23, at 402.

53. *Id.*

54. Indeed, the Chinese government has gleefully taken notice that "America's unchallenged global power has already shown signs of decay in the Middle East, as manifested in widespread Arab resentment toward American support for Israel, America's unpopular dual containment policy against Iraq and Iran, and the European Union's more assertive role in the region." Yoshihara &

the global community and would promote American economic interests in China *without* compromising American security by the creation of an economic giant capable of dominating the United States at some point in the future.

This Note contends that the key—or, at least, one crucial key—to pursuing such an international order is *energy*. The United States must formulate economic, cultural, and diplomatic ties with other key energy states strong enough to *aid* China when it is in our *economic* interest to do so, and strong enough to *deny* China the energy it needs to run a military-oriented economy when our *security* interests require it. This is no small task and it will likely never be absolutely feasible. Yet history has shown that this strategy is largely achievable,<sup>55</sup> and it must be adopted aggressively and without delay by U.S. law. By focusing on this century's two great states and a potentially crucial ally to one or the other, the triangular security strategy proposed here envisions a realistic way to peacefully maximize America's well-being.

For the immediate future, this key energy ally is Russia, which enjoys its distinction for several reasons. First and most importantly, Russia, along with India<sup>56</sup> and Japan, could be the anchors of an Asian counterbalance against Chinese hegemony.<sup>57</sup> Second, closer ties to Russia would greatly aid the United States in diversifying its oil supplies, a key feature of America's evolving twenty-first century energy strategy.<sup>58</sup> Third, in addition to its ever-growing oil reserves, Russia resides atop the world's largest source of natural gas,<sup>59</sup> and closer economic ties through oil would very likely lead to closer ties to the Russian gas market. Fourth, Russia could provide a bonanza of investment opportunities for American commerce in other emerging markets as well. Finally, by virtue of its culture and geographic location, Russia is an oil-producing state that is highly unlikely to ever threaten the United States by terrorist means<sup>60</sup> and could be a

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Sokolsky, *supra* note 32, at 64.

55. Such concerns have been recognized and pursued by nations in the past (including the United States), particularly during times of war. Japan, for example, was motivated largely by an uncompromising need for oil to invade Manchuria between the World Wars. YERGIN, *supra* note 3, at 305-58. Moreover, Japan sought to minimize its oil dependence upon the United States (then the world's leading oil producer) because "Japan feared," correctly so as it turned out, "that *such dependence would cripple it in a war.*" *Id.* at 309 (emphasis added).

56. For an excellent discussion of the overall power play between the United States and China, see James F. Hoge, Jr., *A Global Power Shift in the Making: Is the United States Ready?*, FOREIGN AFF., July-Aug. 2004, at 2. Hoge suggests that the United States should promote India as a counterbalance to China. Although India will undoubtedly act as a counterbalance in the future, this Note argues that Russia could play a similar role (though on a lesser scale in the long-run), and that Russia has the additional advantage of providing the United States with a strategic energy partnership.

57. MEARSHEIMER, *supra* note 23, at 47.

58. U.S. ENERGY ASS'N, *supra* note 2, at 14.

59. U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: RUSSIA 1 (2005), available at <http://www.eia.doe.gov/emeu/cabs/russia.html> [hereinafter U.S. ENERGY INFO. ADMIN.: RUSSIA].

60. The oil industry is especially sensitive to the political realities of individual nations and

valuable partner in America's war on terror.<sup>61</sup>

Of course, it is inconceivable that any one nation could use force to dominate all of the world's oil reserves. The United States has demonstrated the difficulty in securing just one country (Iraq). Even with twenty percent of the world's population, it is unlikely that China could do so either. This Note's proposed strategy is more realistic than to advocate mere military force—it is a strategy of *degree*. The problem that U.S. law and policy should address is *not* how America could best intimidate the world's oil suppliers; rather, the proper question is how America could best induce other key energy states to *prefer* the United States over China in global energy markets, particularly in the event of a conflict between the United States and China. The latter question is tremendously practical and must reside upon a raw appeal to the self-interests of the energy states involved. It is thus a question upon which to ground an effective policy.

Skeptics of the real-world applicability of this "persuasive" approach should consider the fact that China is now acting in a manner calculated to diminish America's ability to form strategic alliances with other Asian nations, especially oil-rich nations. This so-called "good neighbor policy"<sup>62</sup> is China's effort to assuage the anxieties of its neighbors as it continues to grow economically and militarily and to simultaneously preclude the United States from inciting China's neighbors to act in their own interests by slowing China's meteoric ascendancy.<sup>63</sup> It is unlikely that either China or the United States could militarily occupy enough of the world's oil-producing states to cripple the other; instead, China realizes it must *persuade* potential allies—including Russia—to support it.

If recent history is any indication, some American policymakers today do not appreciate the value of an economically, culturally, and diplomatically-based foreign policy. Public relations efforts will be at least as important as the threat of military force if the United States is to secure its energy supply and if it is to build allies to balance Asia's emerging giant. Methods of persuasion must include the strongest inducement—economic ties and money—but other factors should be used as well, including strategic military agreements and a new *modus*

to the world at-large. Political risk must be taken into account by companies, and minimized by interested governments, if the industry is to maximize its potential for investors and states alike. Thomas W. Walde, *Managing the Risk of Sanctions in the Global Oil & Gas Industry: Corporate Response Under Political, Legal and Commercial Pressures*, 36 TEX. INT'L L.J. 183, 184 (2001).

61. Indeed, Russian president Vladimir Putin has declared "all-out war" on terrorism. Mike Eckel, *Putin Promises Reforms to Quell "All-Out War,"* INDIANAPOLIS STAR, Sept. 5, 2004, at A1.

62. Tellis, *supra* note 50, at 52-54.

63. *Id.* at 54. "[China] has sought to develop friendly relations with the major states on its periphery—Russia, Japan, India, and the Central and Southeast Asian states—that are potential balancing partners in any future U.S.-led, anti-Chinese coalition." *Id.* at 53. Tellis further acknowledges that "[t]his strategy of emphasizing peaceful ascendancy in word and deed will likely satisfy Chinese interests *until it becomes a true rival of the United States*. At that point, China will face another strategic crossroads." *Id.* at 54 (emphasis added). This is consistent with the theory of offensive realism.

*operandi* in foreign affairs emphasizing overt displays of respect for the other culture and a general humility on America's part. Humility does not undermine the projection of strength. Sinking into an intractable military quagmire, however, does.

Of course, the threat of military force remains—and should remain—the ultimate trump card in America's hand. The principal problem in recent years is that American policy has excluded the foregoing factors altogether while overextending—and, incidentally, weakening—America's military trump card.

If the United States is able to establish sufficiently deep ties with these key states, most notably Russia, it will have taken a crucial step toward securing its health in the twenty-first century. In the event of a conflict under this persuasive policy, the United States could cut off a large portion of the oil upon which China relies without resorting to military force. Military force could, of course, destroy a large percentage of China's coal and electrical infrastructure. At that point, China would be unable to wage war. When a society is unable to fuel itself, it is almost disingenuous to say that a cogent society exists at all.

The persuasive approach ought to appeal to lawmakers of all political ideologies. Conservatives should be pleased by the fact that such a policy would place paramount emphasis upon America's security, while at the same time promoting the nation's economic interests abroad. Liberals ought to be mollified because this approach is a more "human" diplomacy, and it reduces the likelihood of war in the future: the United States would have fewer incentives to fight, and China's capability to wage war could be substantially compromised. The attractiveness of this plan to political moderates is readily apparent—at the core of the persuasive approach is an appeal to reason and balance, the end result of which would promote several of America's most crucial symbiotic interests. Moderation is where idealism meets reality. The plan proposed here resides at just that point: it is faithful to America's ideals yet realistic enough to succeed in the real world.

Timing is crucial. The United States has, throughout its history, stumbled into the future, costing the nation far more by intransigence than it would have paid with thoughtful preparation.<sup>64</sup> China's rise is not an event that America can afford to neglect, yet it appears that this is precisely what U.S. lawmakers are doing.<sup>65</sup> American law *must* prepare *now* for a changing world.

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64. See WILLIAM A. DEGREGORIO, *THE COMPLETE BOOK OF U.S. PRESIDENTS* 425 (4th ed. 1993). One commonly referenced example is the Senate's rejection of the Treaty of Versailles following World War I, an event some historians have largely credited with precipitating the Second World War.

65. As one journalist points out,

The war on terror is crucial, winning in Iraq is necessary, Middle East peace is important. But I wonder whether as we furiously debate these matters in America, we resemble Englishmen in the waning days of the British Empire. . . . They tried mightily, and at great cost, to stabilize disorderly parts of the globe. Meanwhile, across the Atlantic, the United States of America was building its vast economic, technological and cultural might, which would soon dominate the world.

In foreign affairs, the United States should immediately pursue the strongest possible relations with nearly all oil-producing states, particularly those near China, since in addition to their value as energy suppliers, these states could serve as a counterbalance to China in its own backyard. The most important of these states is Russia. In charting this route, America must employ as many facets as possible to make its relationships as deep as possible. To date, the United States has not pursued key states competitively, nor have policymakers indicated interest in altering America's approach to international relations. The United States must peacefully compete with China for the faithfulness of these crucial states so that America will have the upper-hand in any future conflict with China. This approach would also provide the Chinese government with a potent disincentive to initiate a conflict with the United States. Diplomacy must be employed to secure treaties, executive agreements, and informal arrangements to promote these goals with key energy allies. The promotion of greater access for American interests in the Russian energy market should be chief among these aspirations.

Domestic law has a lesser, but nevertheless important, role to play in America's twenty-first century energy strategy. In particular, American lawmakers must resist the urge to sanction Russian industries and should remove other barriers to the trading of energy commodities, goods, and services. Additionally, lawmakers should consider restoring the President's trade promotion authority and should leverage international organizations such as the World Trade Organization. Although not immediately relevant here, other useful domestic programs such as energy conservation and alternative fuel research and development should be pursued aggressively in conjunction with the legal strategy proposed here.

*What* America's lawmakers must seek to accomplish is clear. The remainder of this Note addresses exactly *how* the domestic and foreign laws of the United States could work to secure the nation's interests in a rapidly-changing and potentially dangerous world. Part II briefly considers the positions of the United States, China, and Russia, particularly with respect to energy. Each country's relevant strengths and weaknesses will be identified and employed as the basis of the Note's legal proposals in Part III, which explores two dimensions of the law: actual legal changes within Russia that America should pursue, and some of the legal mechanisms available to encourage the changes. Finally, Part IV summarizes the role American law can play in fortifying our national interests pursuant to the triangular security strategy.

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Fareed Zakaria, *What Bush and Kerry Missed*, NEWSWEEK, Oct. 25, 2004, at 58. Today, China is building, and the United States is distracted. Perhaps the United States can avoid the mistake that Western Europe made in the nineteenth and twentieth centuries. At the rate China is rising, however, America will not have the luxury of a few centuries to secure the future. The time for America to prepare is *now*.

## II. OPPORTUNITIES AND HAZARDS: A BRIEF SURVEY OF EACH COUNTRY'S POLICY GOALS

### A. *The United States: Hegemon Under Fire*

In 2003, the U.S. averaged total gross oil imports<sup>66</sup> of about 12.2 million barrels per day. These imports represented approximately sixty-two percent of total U.S. oil demand, and over forty percent of this petroleum came from OPEC nations.<sup>67</sup> Additionally, oil demand in the United States is expected to grow thirty-seven percent by 2025.<sup>68</sup>

Diversification of America's energy sources is thus a crucial facet to its future: "Energy investments are costly and risky, requiring long-term commitments. Recognizing this reality, U.S. energy policy seeks to encourage expansion and diversification of energy supplies."<sup>69</sup> One of the most attractive regions for diversification is Russia and the Caspian Basin.<sup>70</sup>

Presently, the United States lacks an effective energy policy and is thus "vulnerable, in both economic and foreign policy terms," in the realm of oil.<sup>71</sup> "The United States," writes Senator Chuck Hagel (R-NE), "has an interest in assuring stable and secure supplies of oil . . . U.S. national security therefore depends on political stability in the Middle East and other potentially volatile oil- and gas-producing regions."<sup>72</sup>

In the realm of energy, then, the United States needs the greatest possible number of politically-stable, energy-producing allies overseas. At least one U.S. Senator recognizes the key role that Russia could play as America seeks to diversify its oil suppliers.<sup>73</sup> In the long term, America must consider China's rising demand for oil, how this growing demand will influence U.S. energy

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66. "Gross oil imports" include crude oil plus oil products. U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: UNITED STATES OF AMERICA 18 (2005), available at <http://www.eia.doe.gov/emeu/cabs/usa.pdf>.

67. "Overall, the top suppliers of . . . oil during January-October 2004 were Canada (1.6 million bbl/d), Mexico (1.6 million bbl/d), Saudi Arabia (1.5 million bbl/d), Venezuela (1.3 million bbl/d), and Nigeria (1.1 million bbl/d)." *Id.* at 4. The abbreviation "bbl/d" stands for "million barrels per day." *Id.* at 2.

68. Reuters, *Petroleum Demand to Grow 37% by 2025—EIA*, MSNBC, Dec. 9, 2004, <http://www.msnbc.msn.com/id/6685647>.

69. Alan Larson, *Geopolitics of Oil and Natural Gas*, 9 ECON. PERSP. (U.S. DEP'T OF STATE) 10, 10 (May 2004), available at [http://www.ciaonet.org/olj/ep/ep\\_may04/ep\\_may04c.pdf](http://www.ciaonet.org/olj/ep/ep_may04/ep_may04c.pdf) (subscription required).

70. *Id.* At least one State Department official believes that "Russia already is an energy superpower." *Id.*

71. C. Fred Bergsten, *Foreign Economic Policy for the Next President*, FOREIGN AFF., Mar.-Apr. 2004, at 88.

72. Chuck Hagel, *A Republican Foreign Policy*, FOREIGN AFF., July-Aug. 2004, at 68.

73. Senator Hagel writes, "As U.S. energy policy seeks to ensure diversified sources of energy . . . we must seek a policy that includes Russia as a strategic trading partner." *Id.* at 74.

security, and the larger geopolitical portrait of the United States and China as the globe's two most influential states.

In seeking to promote its political, economic, energy, and security interests, America can offer potential allies many attractive inducements, including foreign aid from the U.S. government, potentially billions of dollars in private American investment, technology sharing, and other strategic economic and security interests.<sup>74</sup>

### B. China: A Paranoid Giant

China is now the world's second largest demander of oil and is projected to consume 14.2 million barrels daily by 2025 with a net import of 10.9 million barrels per day.<sup>75</sup> In 1998, Beijing reorganized its state-owned petroleum assets into two vertically-integrated firms: the China National Petroleum Corporation ("CNPC") and the China Petrochemical Corporation ("Sinopec").<sup>76</sup> Other major firms include the China National Offshore Oil Corporation ("CNOOC") and China National Star Petroleum.<sup>77</sup> To date, the Chinese government still holds majority shares in CNPC, Sinopec, and CNOOC; the Chinese government "[has] not give[n] . . . foreign investors a major voice in corporate governance."<sup>78</sup>

The unwillingness of the Chinese government to give foreign investors significant influence over the state's petroleum companies suggests an acute paranoia afflicting the government as it pursues a reliable energy supply. China's increasing dependence upon foreign crude oil is, "[f]or the security-obsessed Chinese . . . scary."<sup>79</sup> As a result, the government is explicitly adopting offensive military scenarios to reinforce its petroleum supply<sup>80</sup> and is working to ensure that energy is not cut off from the mainland: "the Chinese are grabbing what they can—and fending off anyone with a rival claim in a show of muscular petrodplomacy."<sup>81</sup> Some in the Chinese media see immediate conflicts over oil as inevitable, particularly with Japan.<sup>82</sup> At least one scholar has suggested that

74. The inducements America can offer to the rest of the world are considered at length *infra* Part III.C.

75. U.S. ENERGY INFO. ADMIN.: CHINA, *supra* note 21, at 2.

76. *Id.* CNPC works primarily on China's north and west and focuses on crude oil production; Sinopec operates in China's south and specializes in refining.

77. CNOOC "handles offshore exploration and production," while National Star is relatively new. *Id.* at 3.

78. *Id.*

79. Brian Bremner & Dexter Roberts, *The Great Oil Hunt*, BUS. WEEK, Nov. 15, 2004, at 60-61.

80. *Id.* at 61. "[T]he [Chinese] military," noted the two journalists, "has published a book, called *Liberating Taiwan*, that imagines Chinese warships seizing sea routes to the Persian Gulf and imposing an oil embargo on Taipei, Tokyo, and Washington." *Id.*

81. *Id.*

82. *China and Japan's Oil Rivalry Unavoidable*, CHINA DAILY, July 13, 2004, [http://www.chinadaily.com.cn/english/doc/2004-07/13/content\\_347868.htm](http://www.chinadaily.com.cn/english/doc/2004-07/13/content_347868.htm).

this posturing is unsurprising, given that “a liberal internationalist foreign policy is incompatible with China’s illiberal domestic order.”<sup>83</sup>

These trends reinforce the theory of offensive realism as China escalates its competition with other nations for economic and security interests. American policymakers should note the immutable mindset of Chinese officials as they create U.S. energy security policy for the twenty-first century.

### *C. Russia: Land of Opportunity?*

Since the collapse of the Soviet Union, the Russian economy has continued to fair unfavorably in global markets. Russia enjoys great potential for becoming an economic force in the world, in part due to its population and in part by virtue of its considerable reserves of natural resources—including oil and natural gas.<sup>84</sup> It is noteworthy that Russia exported roughly seventy percent of its crude oil production in 2002.<sup>85</sup>

Russia appears to recognize the importance of its energy sector in “speed[ing] up the country’s economic revival and enhanc[ing] its geopolitical weight.”<sup>86</sup> In spite of this recognition, however, domestic struggles for power now appear to trump Moscow’s concerns regarding economic growth and international political prowess.<sup>87</sup> To the extent the Kremlin has concerned itself

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83. Minxin Pei, *Beijing’s Closed Politics Hinders “New Diplomacy,”* FIN. TIMES (U.K.), Sept. 13, 2004, at 21.

84. Indeed, Russia’s real gross domestic product grew by 7.1% in 2004, “surpassing average growth rates in all other G8 countries, and marking the country’s sixth consecutive year of economic expansion.” U.S. ENERGY INFO. ADMIN.: RUSSIA, *supra* note 59, at 1. Of particular interest is the fact that “Russia’s economic growth over the last five years has been fueled primarily by energy exports, particularly given the boom in Russian oil production . . .” *Id.*

85. *Id.* at 3. Of the exports, nearly two-thirds went to nations along Druzhba, Russia’s major export line. *Id.* Given the efficiency of pipeline transportation, *see id.*, one key security concern for American policymakers should be future routes for Russian petroleum and natural gas pipelines. *See* Andrew Jack, *Pipeline Politics: Common Interest in Oil is Bringing Russia and China Together*, FIN. TIMES (U.K.), May 29, 2003, at 12.

86. Vladimir Radyuhin, *Russia Plays Energy Card*, HINDU, July 6, 2004.

87. *See generally* Andrew Jack, *Foreign Investment in Limbo as Putin’s Team Backtracks*, FIN. TIMES (U.S.A.), Oct. 8, 2004, at 3. As Jack notes,

Three elements have combined to create a deadlock [to foreign investment since Putin was reelected in March 2004]: the broad path of economic reform has been thrown into question by Mr [sic] Putin and his new team; the Kremlin has further centrali[z]ed power to create overload at the top; and “administrative reform” designed to smooth government operations appears to have done the opposite.

*Id.* In recent years, the Russian government has expanded its role in the Russian economy (especially in the natural resources sector) and has dampened investor confidence through legal maneuvers such as the government’s conflict with the oil giant Yukos. *Id.* “None of these different elements,” however, “has stopped investment or economic growth in Russia, which continues to flourish. But many fear Mr [sic] Putin’s second term will fall far short of expectations.” *Id.* It is

with energy, it has moved to assert the government more forcefully into the industry.<sup>88</sup>

Many businesses<sup>89</sup> and other groups<sup>90</sup> nevertheless remain optimistic about investment opportunities in Russia, and in the Russian petroleum industry in particular.<sup>91</sup> “Foreign direct investment remains modest but is also increasing, with indications that it may reach record levels above [\$8 billion in 2004].”<sup>92</sup> But the destruction of Yukos, “at least in the short term . . . has fuelled capital flight”

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in the interest of the United States, then, that the environment for U.S. investments in Russia be made more secure.

88. For example, the Russian government has sought to increase its share in Gazprom, the giant gas monopoly in Russia, to just over fifty percent. This is part of a larger strategy “on tightening the state’s direct control over the energy sector.” Andrew Jack, *Kremlin Tightens Grip on Energy*, FIN. TIMES (U.K.), Sept. 15, 2004, at 30.

89. The U.S. oil group ConocoPhillips, for example, is going ahead with its plan to purchase 7.6% of Russian oil giant LUKoil from the Kremlin. The deal, worth \$2 billion, is being made in full view of the Yukos conflict, and ConocoPhillips already has plans to increase its ownership to twenty percent in the future. “The deal highlights the necessity of Kremlin backing for any large Russian deal particularly in natural resources,” but we now live in “a time when international oil groups are very keen to find ways to replace and increase reserves around the world.” Stefan Wagstyl, Arkady Ostrovsky & Doug Cameron, *ConocoPhillips Puts its Faith in Russia*, FIN. TIMES (U.K.), Sept. 30, 2004, at 32. This illustrates the compelling incentives for the United States to aid the Russian economy—and demonstrates how doing so will advance America’s interests.

90. “Yukos does not matter[,]” writes Charles Hecker, associate director for Russia and the former Soviet Union at the Control Risks Group. “The fate of the billions of dollars invested in Russia’s economy every year, and Russia’s future as a destination for billions more of those dollars, do not singularly depend on the outcome of *l’affaire Yukos*.” While the Kremlin is admittedly seeking more influence over the Russian economy, and although investments in the oil industry may “require a closer alignment of the investor’s goals with the state’s priorities,” Hecker insists the most radical conclusion to be drawn from the Yukos scandal [is that] international companies should not rule out investing in the Russian oil industry.

....

The Yukos conflict matters only if you are surprised by it.

....

. . . [S]eeing the Yukos scandal for what it is (a reckless foray into the private sector, with an ulterior motive) and, conversely, not seeing it for what it is not (the needlework on a new iron curtain) is the only way to get a clear view of the country.

Charles Hecker, *There’s More to Russia than Yukos*, FIN. TIMES (U.S.A.), Nov. 24, 2004, at 15.

91. “International oil companies cannot keep away from Russia[,]” and “in spite of the difficulties, international oil groups will persevere because of the scale of Russia’s untapped resources.” Stefan Wagstyl, *Still Worth It in Spite of the Risk*, FIN. TIMES (U.K.), Oct. 19, 2004, at 3.

92. Andrew Jack, *Under the Cover of Law and Order*, FIN. TIMES (U.K.), Oct. 19, 2004, at 1.

because “[t]he integrity of private ownership is a massive question now.”<sup>93</sup>

It thus appears that although the Kremlin’s recent moves to exert greater influence over Russian petroleum have blunted the industry’s full potential, the prospective profits Russia could yield are still proving irresistible. Some commentators reject the idea of a close U.S.-Russian relationship.<sup>94</sup> Most, however, agree that the United States should do all that it can to encourage hospitality in the Russian investment environment, at least for American investors. Establishing stronger ties with Russia is a complex undertaking, both substantively (defining what kinds of policies would be in America’s interests) and procedurally. Because the United States cannot simply dictate Russia’s domestic policy to Moscow, American policymakers must *persuade* their Russian counterparts by *showing* how proposed policies are in the best interests of both nations. In the case of modern Russia, this effort will necessarily include an appeal to the nation’s current political leadership, which seeks to increase its own control over the country.<sup>95</sup>

Such appeals from the United States to Russia are absolutely essential and demonstrate that domestic and international *political* realities will ultimately determine America’s success in fostering a new Russian ally. The principal content of the appeals themselves, however, must concern *legal* reforms. The kinds of legal reforms within Russia that the United States should seek, as well as the legal mechanisms for securing these reforms, are the focus of Part III of

93. *Id.*

94. See, e.g., Martin Wolf, *We Make Common Cause with Putin at Our Peril*, FIN. TIMES (U.K.), Sept. 22, 2004, at 21. Wolf writes that “[a] struggle against terrorists cannot be won by military means. . . . This struggle can ultimately be won only in the hearts and minds of Muslims. . . . A close alliance with Mr [sic] Putin’s Russia can only achieve the opposite[.]” because “Mr [sic] Putin’s road to power is paved with Chechen corpses.” *Id.* Although an analysis of the Chechen conflict is beyond the scope of this Note, and although Wolf likely raises a valid point in the importance of psychological persuasion in the war on terror, it is highly questionable whether a close alliance with Russia would preclude the United States from pursuing such a policy. First, the Chechen conflict is more complex than Wolf appears to appreciate, and although the United States by all means should encourage “humane warfare” on Russia’s part, war inherently involves a certain degree of tragic consequences. Unless the United States insists upon Russia’s surrender to acts which are undeniably terrorist in nature, it will be difficult to avoid violence altogether. This is not to say that America should turn a blind eye to violence; it is only to suggest that America must be very cautious in dictating to other nations what they may and may not do to protect themselves from terrorist activities, particularly as America engages its own “war on terror” abroad.

Second, greater U.S. ties to Russia will place America in a stronger position to pressure the Kremlin to uphold the very standards Wolf apparently feels the Russian government lacks.

Finally, as a practical matter, China is pursuing a close relationship with Russia regardless of how it conducts its conflict with Chechnya—and as seen *supra* Part I—this is a prospect which, even by itself, ought to inspire the deepest concerns in American policy circles. See also *infra* note 171 for the necessity of promoting humane policies in Russia’s foreign affairs.

95. See Tom Fenton, *Russia’s New Face Emerges*, CBSNEWS.COM, Sept. 20, 2004, <http://www.cbsnews.com/stories/2004/09/20/opinion/fenton/main644333.shtml>.

this Note.

III. FUELING AMERICA’S FUTURE: THE TRIANGULAR SECURITY STRATEGY

A. *Current U.S. Energy Security Policy*

By its nature, energy security is not the sort of law subjected to frequent litigation. Although issues tangential to general energy policy may be litigated (for example, a particular environmental regulation bearing upon gasoline standards), energy *security* concerns the nation’s ability as a whole to continue fueling its economy, defense, and way of life.<sup>96</sup> Hence, the judiciary is largely unconcerned with the topic, and case law is not a rich source in evaluating America’s energy security. Instead, this field of law is formulated primarily by the executive branch (this is especially true in the international context when considering the role of other nations), and, to a lesser extent, by Congress.

As a result, it does not come as a surprise that relatively few statutes address energy security. Most statutes that do address the subject bear upon domestic consumption initiatives<sup>97</sup> or upon emergency supplies.<sup>98</sup> America’s domestic statutory scheme only recently began to account for the rise of China’s energy demands.<sup>99</sup>

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96. Recall the definition of “energy security,” *supra* note 2.

97. *See, e.g.*, Biomass Energy and Alcohol Fuels Act of 1980, 42 U.S.C. §§ 8801-8871 (2000) (requiring, *inter alia*, the formulation and implementation of a national program for increased production and use of biomass energy); National Energy Policy Plan, 42 U.S.C. §§ 7321-7322 (2000) (requiring the President to submit periodic reports to the Congress outlining the nation’s energy needs and specific proposals to meet those needs).

98. 42 U.S.C. §§ 6231-6246 (2000) (establishing and directing the Strategic Petroleum Reserve).

99. The Energy Policy Act of 2005, a bill of more than 1700 pages signed into law on August 8, 2005, directs the Secretary of Energy to “conduct a study of the growing energy requirements of the People’s Republic of China and the implications of such growth on the political, strategic, economic, or national security interests of the United States.” Energy Policy Act of 2005 § 1837(a), Pub. L. No. 109-58, 119 Stat. 594 (2005). The Secretary published this report in February 2006. U.S. DEPT. OF ENERGY, SECTION 1837: NATIONAL SECURITY REVIEW OF INTERNATIONAL ENERGY REQUIREMENTS (Feb. 2006), *available at* [http://www.pi.energy.gov/pdf/library/EPACT1837\\_FINAL.pdf](http://www.pi.energy.gov/pdf/library/EPACT1837_FINAL.pdf). The report provides an outstanding overview of the implications of China’s rise for U.S. energy security. To its credit, the Department of Energy makes brief mention of Russia as one source of Chinese oil and natural gas. *Id.* at 5, 20, 22-23, 25, 33. The report also considers Russia with respect to the United States in the context of “a comparison of the applicable laws and regulations of an illustrative group of nations to determine whether a United States company would be permitted to purchase, acquire, merge, or otherwise establish a joint relationship with an entity whose primary place of business is in that nation.” *Id.* at 41. The report provides a brief synopsis of the Russian investment environment (*Id.* at 42-43, 49) consistent with the analysis put forth in this article, *see supra* Part II.C, but does not, however, suggest any strategy on par with the one contemplated here. It the purpose of this Note to suggest that as the executive and Congress

Regrettably, presidential action in this sphere has also been limited. The executive branch published its most recent and significant proposal in the 2001 report entitled "National Energy Policy."<sup>100</sup> Although the report acknowledges<sup>101</sup> the general global picture of increasing demand and decreasing supply,<sup>102</sup> it does not fully appreciate the emerging energy paradigm. "A primary goal of the National Energy Policy is to add supply from diverse sources . . . . This means *domestic* oil, gas, and coal. . . ."<sup>103</sup> As noted previously,<sup>104</sup> this is myopic.<sup>105</sup> Short of an unforeseen, history-altering technological breakthrough (one upon which neither the United States nor the rest of the world has any business placing its security hopes), the need for oil is a certainty in the near future, and foreign dependence is inescapable. Foreign reliance is a reality, and not a problem *per se*; rather, it is a lack of diversity amongst allied suppliers and a hegemonic Chinese competitor that pose the greater security threat to America.

The Bush Administration has engaged the Russian energy community to a limited degree. In May 2002, Presidents Bush and Putin launched a new energy dialogue; this effort has since yielded two U.S.-Russia Commercial Energy Summits.<sup>106</sup> The second summit produced a report which identifies several ways in which the two nations might increase cooperation on energy issues.<sup>107</sup> The report addresses several topics of importance, including Russia's investing environment,<sup>108</sup> regulatory reform,<sup>109</sup> and the role of pipelines.<sup>110</sup>

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construct a policy in light of the new report, policymakers should consider and plan for the significant role that Russia will play—for better or worse—in America's twenty-first century energy security.

100. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, NATIONAL ENERGY POLICY (2001), available at <http://www.whitehouse.gov/energy/National-Energy-Policy.pdf>. The report is a product of National Energy Policy Development Group, which is charged with developing the nation's energy policy.

101. *Id.* at viii.

102. *See supra* notes 9-15 and accompanying text.

103. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, *supra* note 100, at xiii (emphasis added).

104. *See supra* notes 9-20 and accompanying text.

105. The report mitigated its dedication to increasing domestic supplies somewhat when it stated "we recognize that a significant percentage of our resources will come from overseas[]" and "we must build strong relationships with energy-producing nations in our own hemisphere . . . ." THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP, *supra* note 100, at xv. But even this restricts executive vision to America's (admittedly important) immediate neighbors, thereby ignoring Russia and China.

106. Rachel Halpern, *U.S.-Russia Commercial Energy Summit*, EXPORT AM., Dec. 2003, at 21. The summits included government officials and private energy interests from both nations. Both summits focused on the manner in which a closer energy relationship between the United States and Russia could be realized.

107. U.S.-RUSSIA BUSINESS COUNCIL, REPORT OF THE U.S.-RUSSIA COMMERCIAL ENERGY DIALOGUE 1 (2003), available at [http://www.usrbc.org/PFFs/ced\\_Sept2003.pdf](http://www.usrbc.org/PFFs/ced_Sept2003.pdf).

108. *Id.* at 1-2. Of particular concern are a new Subsoil Law (which should, *inter alia*, provide

These and other proposals are considered briefly below.<sup>111</sup> Most of these proposals are themselves meritorious. Three principal problems nevertheless continue to haunt U.S. energy security policy. First, the Bush Administration has not pursued proposed reforms aggressively enough. Although the evolution of closer ties to Russia will undoubtedly take time, Washington appears to be distracted by other matters, some pressing, and some less justifiable. The legal *methods* available to the Bush Administration in bringing about Russian reforms are also considered here.<sup>112</sup> The second problem U.S. policy continues to encounter is a persistent myopia—limiting the primary focus of U.S. energy concerns to North America.<sup>113</sup> Although America's ties to surrounding countries are unquestionably important, ignoring the new international energy picture is something the United States simply cannot afford to do.<sup>114</sup> Finally, U.S. policymakers continue to de-emphasize the role of persuasion in foreign affairs. A reconsideration of America's general approach to foreign relations is warranted,<sup>115</sup> and this includes particular attention to the importance of public relations efforts.<sup>116</sup>

### *B. Legal Changes for America to Pursue in Russia*

Why America must seek change in Russia is clear. It remains to be seen, however, *which* precise legal results the United States ought to advance. Below is a consideration of some of the most pressing legal issues that the U.S. government should address without delay. In addition to a number of fundamental general changes, the issues of production sharing agreements, special economic zones, and reforms to pipeline regulation present themselves as candidates worthy of attention.

1. *Changes Generally.*—Several broad reforms must be pursued before a closer strategic partnership can be cemented between the United States and Russia. If deep ties are to be established, economic ties will be chief among them. American investment in Russia (particularly in Russia's energy sector) must be promoted. U.S. interests will benefit with new investment opportunities; the Russian public will benefit with additional jobs; the Russian government will

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investors with more stability in their contracts with the Russian government and secure other legal rights with greater certainty) and reforms to the Russian tax code that make high-risk projects more attractive for investors.

109. *Id.* at 2-4. Investors here seek fewer regulations as well as transparency and stability in those regulations that are adopted.

110. *Id.* at 4-7. A clear and unmistakable definition of the rights of private investors in Russia's pipelines projects is indispensable, and the need for pipelines is unquestioned.

111. *See infra* Part III.B.

112. *See infra* Part III.C.

113. *See, e.g., supra* notes 103-05.

114. *See generally supra* Parts I-II.

115. *See supra* Part I.C. (discussing the value of persuasion in foreign relations).

116. *See supra* Part I.C. and *infra* Part III.C.4.

benefit from increased tax revenue; and the two nations will benefit by simultaneously bolstering Russia's economy (thereby providing one counterbalance to the rising Chinese hegemon) and shielding America's energy security to a greater degree in the face of Russia's rising neighbor.

As has been persuasively argued, Russia's own legal and regulatory systems are primarily to blame for the absence of foreign investment in the country.<sup>117</sup> The first and most obvious obstruction is the complete lack of legal infrastructure to define ownership and entitlement in oil and gas projects.<sup>118</sup> Without clear and definitive rules as to who gets what, investors are understandably reluctant to put money into Russia. Foreign companies need specific and explicit guarantees from the Russian government on a project-by-project basis to ensure that the terms of any deal between the company and Moscow are not unilaterally changed by the government.<sup>119</sup> Other disincentives for foreign investors include the severity and instability of the Russian tax code, jurisdictional problems still being hammered out in Russia's embryonic federalism, and the legal uncertainties that Russian environmental laws create.<sup>120</sup>

Moreover, the Russian government has recently erected yet another substantial obstacle to foreign investment: any company bidding for oil and mineral deposits in 2005 must be at least fifty-one percent Russian-owned.<sup>121</sup> "[This] ban," note two journalists, "is part of a trend by the Russian government to reassert control over strategic areas of the country's economy and keep foreigners out of the most lucrative assets."<sup>122</sup> The government subsequently defended its action by correctly pointing out that a country has the right to control the use of its own natural resources.<sup>123</sup>

This, however, misses a broader point. By placing such substantial restrictions upon the opportunities of foreign investors, the Russian government has incited otherwise eager companies to simply wait and watch.<sup>124</sup> As the rest

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117. See generally Shulga, *supra* note 39.

118. Thomas W. Waelde, *International Energy Investment*, 17 ENERGY L.J. 191, 212 (1996).

119. *Id.* at 211-12. One form for such guarantees is the production sharing agreement. See *infra* Part III.B.2.

120. Deborah K. Espinosa, Comment, *Environmental Regulation of Russia's Offshore Oil & Gas Industry and its Implications for the International Petroleum Market*, 6 PAC. RIM L. & POL'Y J. 647, 648-49 (1997).

121. Kevin Morrison & Arkady Ostrovsky, *Moscow Blow to Foreign Companies*, FIN. TIMES (U.S.A.), Feb. 11, 2005, at 1. One source close to the Russian government has stated that the ban is motivated by a desire to have raw materials processed in Russia: "foreign companies often accumulate reserves simply to increase market capitalisation, rather than developing them . . . ." *Id.*

122. *Id.*

123. Neil Buckley, *Russia Defends Rules on "Foreign" Bidders*, FIN. TIMES (U.K.), Feb. 17, 2005, at 6.

124. Doug Cameron et al., *Wary Energy Groups 'Wait and See' on Russian Cap*, FIN. TIMES (U.S.A.), Feb. 11, 2005, at 4.

of the world (including China) advances, opportunities to develop Russia are melting away; without foreign investment, the Russian petroleum industry has no hope of meeting its full potential, or even of functioning in a rudimentary manner.<sup>125</sup> Ironically, Russian policymakers who are motivated by a desire to secure their own power are making themselves *less* secure by debilitating the Russian oil industry.<sup>126</sup>

The United States should lobby the Russian government, through its normal legislative process and through the methods discussed here,<sup>127</sup> in an effort to devise a transparent and stable system of foreign investment in Russia. Contractual and property rights must be secured, and limits on foreign investments should be eliminated.

2. *Production Sharing Agreements ("PSAs")*.—The PSA “is a contract between a State and a private entity, usually a foreign investor to exploit the State’s natural resources and to divide, in a contractually agreed proportion, the resultant product between the State and the investor.”<sup>128</sup> It is attractive to foreign investors precisely because “it shields investors from unclear laws and provides better protection in case of a possible conflict.”<sup>129</sup>

Russia’s evolving PSA statute has enjoyed limited success due in part to political tensions within Russia<sup>130</sup> and fundamental legal issues.<sup>131</sup> Nevertheless, “[d]espite the lack of PSA investment projects, . . . the PSA Law has the potential to become in the near future a leading vehicle for investment in the Russian natural resource sector.”<sup>132</sup>

This vision could be realized through the combined efforts of American interests and the U.S. government. Work is currently underway “to identify aspects of the PSA Law and of the Russian legal system generally that run

125. Shulga, *supra* note 39, at 1093-94.

126. “A faltering Russian oil sector would be a disaster for the world economy as well as for Russia itself. Mr [sic] Putin must recogni[z]e that he needs a well managed and well capitalised petroleum sector.” J. Robinson West, *Putin’s Policies Threaten Global Oil Supplies*, FIN. TIMES (U.K.), Feb. 2, 2005, at 13.

127. *See infra* Part III.C.

128. Vitaly Timokhov, *Recent Developments in the Russian Production-Sharing Agreement Law: Making the Law Work*, 6 UCLA J. INT’L L. & FOREIGN AFF. 365, 366 (2002). This article provides an excellent overview of the evolution of Russia’s PSA law.

129. *Id.* at 367.

130. Giuditta Cordero Moss, *Contract or License? Regulation of Petroleum Investment in Russia and Foreign Legal Advice*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 519, 529-30 (2003). “[I]nternal power conflicts prevented a clear definition of the authorities’ competence to commit the state [to a deal].” *Id.* at 530.

131. *Id.* at 530-31. “[T]he proposed idea of an all-embracing, self-sufficient PSA Law that would supercede [sic] any past legislation and would prevail over any future legislation, conflicted with the paramount position that Russian legal tradition gives to the concept of sovereignty.” *Id.* at 530.

132. Timokhov, *supra* note 128, at 388-89.

counter to the principles of the contractual system.”<sup>133</sup> PSAs could help provide transparent terms and stability to foreign investors in Russia. But “[a]s long as essential conditions of the investment such as cost recovery, taxation, transportation, and export rights are regulated not by contractual provisions but by state regulations,” it is unlikely that investors will be inspired to play their necessary role in developing Russia’s potential.<sup>134</sup>

The United States should lobby the Russian government, through its normal legislative process and through the methods presented below,<sup>135</sup> in an effort to promote a stable and secure PSA law for American investors.

3. *Special Economic Zones (“SEZs”).*—The Russian Far East (“RFE”) has great potential in the way of natural resources; the region is also important to Russian industry and security.<sup>136</sup> As of today, however, the RFE is woefully underdeveloped.<sup>137</sup> Any measures the Russian government might take to secure the RFE would promote Russian security (thereby bolstering American security)<sup>138</sup> and, if U.S. energy interests were involved in the development of the RFE, would promote American commerce as well.

One potential method for helping to promote investment and security in the RFE would be to declare it a special economic zone. Although there is no single definition of SEZ, “[t]ypically these zones distinguish themselves from other regions by their relaxed tariff, taxation, and administrative regimes.”<sup>139</sup> In short, the legal apparatus governing the region is created to be especially simple and transparent.

A Russian declaration of the RFE as a special economic zone would help avoid the aforementioned problems plaguing investment in Russia generally. Through a new investment climate in the RFE, or through the use of PSAs, American energy interests would have the legal incentive to provide the requisite capital necessary to fully developing the RFE.<sup>140</sup> Under such a scenario, all parties would once again benefit.<sup>141</sup>

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133. Moss, *supra* note 130, at 534.

134. *Id.*

135. *See infra* Part III.C.

136. Dmitri Trenin, *Putin Must Secure Russia’s Far East*, FIN. TIMES (U.S.A.), Mar. 1, 2005, at 17. The region has suffered deindustrialization since the collapse of the Soviet Union and borders China. *Id.*

137. Valentin A. Povarchuk, Comment & Translation, *Russian Draft Law on Special Economic Zones—A Step Forward, but Not Far Enough*, 13 PAC. RIM L. & POL’Y J. 351, 354 (2004).

138. The greater the number of American allies in Asia, and the greater the strength of these allies, the more secure America will be against China, for the reasons discussed *supra* Parts I-II.

139. Povarchuk, *supra* note 137, at 357.

140. For an excellent discussion regarding the current proposals for creating a special economic zone in the RFE, see generally *id.*

141. This is especially true for Russia’s incumbent policymakers. “By increasing economic development in the RFE,” notes one scholar, “Russia could . . . establish a firmer economic foothold in its territories, thereby reducing the temptation for neighboring nations to do so.” *Id.*

The United States should lobby the Russian government, through its normal legislative process and through the methods presented below,<sup>142</sup> in an effort to promote a stable and secure RFE. The most attractive legal mechanism for doing so is the SEZ; the interests of both nations would be advanced.

4. *Reforms to Pipeline Regulation.*—It is decidedly “in Russia’s interest to accelerate repair and construction projects for oil export pipelines[]” because “[i]ncreased oil export capacity would bring in more hard currency, boosting Russia’s current programs for rebuilding infrastructure with oil export revenues.”<sup>143</sup> Yet, as with the investment climate generally, major pipeline work is unlikely to succeed without foreign funding,<sup>144</sup> and investors are as concerned about the integrity of their money in pipeline work as in other energy projects.

As long as there remains a pipeline monopoly in Russia, a stable environment for infrastructural investments will be difficult.<sup>145</sup> Yet at least one story of success stands out even with the dominant Transneft giant.<sup>146</sup> One scholarly examination notes that the break-up of Transneft is neither necessary nor desirable to promote still greater foreign investments in Russia’s pipeline infrastructure.<sup>147</sup> Rather, “[p]rogress in the [Russian] oil industry requires that the efficient production and circulation of oil . . . consider each party’s interests. To achieve this goal, [Russia’s] federal government should implement a pipeline expansion policy not through a heavy-handed policy but by establishing clear relationships with all interested parties.”<sup>148</sup>

In order to promote Russian pipeline reform, then, the United States should lobby for narrow changes that will account for the concerns of foreign investors. By narrowing the focus of such reforms, the United States will simultaneously provide investors with confidence<sup>149</sup> and will reassure the Russian government

at 352 (emphasis added). This insight is consistent with Parts I and II, *supra*: it is conceivable that a burgeoning China might attempt to assert control over its neighbors’ natural resources were it desperate enough for petroleum. Russia’s Far East as it stands today would be a likely first candidate for such an occupation; the RFE is resource-rich and poorly-secured. If Putin wants to promote his own power, he will secure the RFE, and he needs foreign investors to do so.

142. *See infra* Part III.C.

143. Dylan Cors, *Breaking the Bottleneck: The Future of Russia’s Oil Pipelines*, 7 DUKE J. COMP. & INT’LL. 597, 610 (1997). This article provides an outstanding overview of contemporary Russian pipeline issues.

144. *Id.*

145. *Id.* at 612. Transneft is Russia’s state-owned pipeline monopoly. *Id.* at 604-10.

146. The Caspian Pipeline Project demonstrates that through consultation with all interested parties, Transneft can arrive at stable agreements acceptable to everyone. *Id.* at 613-14.

147. *Id.* at 626. It is further noted that since the government’s motivation in creating the monopoly in the first place was to exercise maximum control over Russia’s pipeline infrastructure, a voluntary dissolution of that monopoly is patently unrealistic as well.

148. *Id.* at 622.

149. Foreign investors need not command exclusive control over a given project; such an arrangement would be unnecessary, unprecedented, and unrealistic. Instead, so long as the most basic legal concerns of investors are guaranteed by the Russian government, foreign capital should

that its sovereignty will not be compromised.<sup>150</sup> In recent years, Russian officials have acknowledged some of these principles in the abstract,<sup>151</sup> yet no concrete reforms to this effect have been enacted. This should be a priority for the American government; without an augmented export capacity, the potential of Russia's energy reserves will go unrealized.

### C. Legal Mechanisms Available for Pursuing Change

What changes America might pursue are clear, as are the *reasons* for pursuing them. It remains to be seen *how* the United States can generate favorable results in Russia. Below is a consideration of some of the legal tools and strategies available to the United States in courting closer ties to Russia. American policymakers must consider the Russian culture as a legal influence and Russia's WTO accession, as well as possible congressional initiatives and the role a concerted public relations campaign might play in future Russo-American relations.

1. *Understanding the Russian Outlook.*—In order for America to effectively persuade Russian listeners to change their present positions, any U.S. proposal must be informed by the general outlook of the audience. There are two audiences in this case: the Russian public, and, more importantly, the Russian government.

The fundamental tension within the Russian government is that policymakers' top priority is to retain and extend their power over national affairs (leading to a distrust of foreign investment, which they view as encroachments upon their authority)<sup>152</sup> while at the same time realizing that without a reenergized economy, their jobs are less secure because Russia itself is less secure. The fact that only foreign investors can provide the necessary financing to fuel the Russian economy is the most antagonistic dimension of the government's dilemma.<sup>153</sup>

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flow into the region. This could likely be achieved through such mechanisms as the production sharing agreement. See *supra* Part III.B.2.

150. As already demonstrated, the most basic requirement of the Russian government is the psychological reassurance that it retains sufficient latitude over events within its own borders. See *supra* notes 121-23 and accompanying text.

151. See Catherine Belton, *Putin: Move Faster on Pipelines*, MOSCOW TIMES, May 27, 2004, at Section No. 2928.

152. See, e.g., *Russia and the Caspian: Hearing on U.S. Energy Security Issues Before the Senate Comm. on Foreign Relations Subcomm. on International Economy Policy, Export and Trade Promotion*, 108th Cong. (2003) (statement of Edward C. Chow, Visiting Scholar, Carnegie Endowment for International Peace) [hereinafter Chow Statement]. Mr. Chow notes that the Russian "[g]overnment fears loss of control . . ." *Id.* at 4.

153. In support of this claim, see *supra* Parts I and II and the foregoing sections of Part III. For the proposition that Russia must develop its oil industry to successfully develop a market economy and that foreign investment secured by stable laws is key to doing so, see generally Laura A. Wakefield, Note, *The Need for Comprehensive Legislation in the Russian Oil and Gas*

As a general, overarching strategy, then, the United States must persuade Russian policymakers that foreign investment will *augment* their power. Examples of the intuitive obviousness of this claim abound.<sup>154</sup> The same logic that moved Russian policymakers in the electrical industry<sup>155</sup> should be emphasized in the oil sector, where it has thus far been defied.<sup>156</sup>

Although there is evidence that the rule of law generally is taking hold in the minds of Russian citizens,<sup>157</sup> Russians entertain a view of the law that is fundamentally distinct from America's legal tradition.<sup>158</sup> In persuading Russian policymakers of the value of foreign investment, and in showing them the need to allay fundamental investor concerns such as property and contract rights, the United States will be promoting its own interests as well as Russia's economic well-being. A concerted public relations campaign is one useful device for communicating these messages.<sup>159</sup>

2. *Russia's WTO Accession.*—To the extent the Russian government is unmoved by rational argument and the lessons of history, it may prove more responsive to a practical concern: Russia wants to join the World Trade Organization ("WTO"). The potential membership benefits to Russia are substantial, including expanded market access for Russian exports, foreign investment, jobs, and a more stable environment for its market reform efforts.<sup>160</sup>

Two-thirds of existing WTO members must approve a non-member's application before the non-member can be admitted. Earning this majority approval, however, is the second step in the WTO accession process; in the first step, an applicant must reach bilateral agreements with any member nation that seeks special concessions from the applicant.<sup>161</sup> This process, combined with the fact that the United States is an existing WTO member and that Russia is an

*Industries*, 29 CASE W. RES. J. INT'L L. 149 (1997).

154. One such example is the fact that Russia is seeking billions of dollars to update its own deteriorated electrical power system. Realizing that the necessary money must come from outside the country, Russia's electrical power monopoly, Unified Energy Systems, obtained approval from lawmakers to create a competitive wholesale market for electricity, even going so far as to abolish limits on foreign ownership in the electrical power sector. *See Halpern, supra* note 106. Moreover, American energy interests stand enthusiastically able and willing to assist in developing the energy sectors of other nations. *See U.S. ENERGY ASS'N, supra* note 1, at 30.

155. *See supra* note 154.

156. *See supra* notes 121-23 and accompanying text (detailing the Russian government's recent moves to restrict foreign investment in natural resources).

157. *See generally* Inga Markovits, *Exporting Law Reform—but Will It Travel?*, 37 CORNELL INT'L L.J. 95 (2004).

158. Specifically, Russian jurisprudence is less dedicated to property and contract rights. Russian authorities still view the law as an instrument to direct state action, not as one to protect and promote investor confidence. Waelde, *supra* note 118, at 198-99.

159. *See infra* Part III.C.4.

160. William J. Kovatch, Jr., *Joining the Club: Assessing Russia's Application for Accession to the World Trade Organization*, 71 TEMP. L. REV. 995, 1006-11 (1998).

161. RAJ BHALA, *INTERNATIONAL TRADE LAW: THEORY AND PRACTICE* 144 (2d ed. 2000).

applicant, declares an opportunity for the United States in ringing terms: *before the United States approves of Russia's application to the WTO, it must employ its negotiations with Russia to extract concessions in the Russian energy world.*

The United States must move quickly in this endeavor (as Russia's application is advancing),<sup>162</sup> and negotiations must be conducted in a way that does not offend the dignity of Russian representatives. As noted above,<sup>163</sup> the United States cannot simply attempt to dictate western legal concepts to Russia. However, it is a legitimate negotiation to offer Russia what it seeks (membership in the WTO) in exchange for what ought to be America's highest priority (greater ties to the Russian energy market). If the United States makes a concerted effort to obtain the specific legal reforms noted above<sup>164</sup> in its WTO concession agreement with Russia, both nations will benefit immensely.

President Bush should immediately direct U.S. representatives concerned with Russia's WTO accession to focus their efforts on the foregoing legal reforms within Russia. Although Russia's application could be approved without U.S. support, such a scenario is unlikely. Even if this did occur, the United States retains the option of "non-application"<sup>165</sup>—that is, America could refuse to extend WTO member benefits (such as greater access to the American economy) to the new member whose admission it opposed. Even the *threat* of non-application<sup>166</sup> could move Russia toward the aforementioned reforms.

3. *Congressional Action.*—In seeking legal reforms in Russia (and in other potential energy partners), the United States Congress has several opportunities to aid the President. The most obvious congressional contribution to the new triangular security strategy would be an appropriation to provide foreign aid to Russia, as well as furthering programs that advance U.S. exports and investments in the region.<sup>167</sup> Active funding for executive initiatives, as well as American aid dedicated to furthering the well-being of the Russian people, would likely ease Russian perceptions of America's "foreign" investors—provided that the aid was packaged and delivered in a dignified, un-patronizing manner.

Congress should also reenact the so-called "trade promotion authority," under which "Congress agrees to consider legislation to implement . . . nontariff trade agreements under a procedure with mandatory deadlines, no amendment, and limited debate. The President is required to consult with congressional

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162. See World Trade Organization, *Russia's Membership Talks Make Good Progress*, WTO.ORG., Feb. 21, 2005, [http://www.wto.org/english/news\\_e/news05\\_e/acc\\_russia\\_21feb05\\_e.htm](http://www.wto.org/english/news_e/news05_e/acc_russia_21feb05_e.htm).

163. See *supra* note 158.

164. See *supra* Part III.B.

165. BHALA, *supra* note 161, at 144.

166. The notion here is analogous to the U.S. President influencing Congress by threatening the use of the veto. See SAMUEL KERNELL & GARY C. JACOBSON, *THE LOGIC OF AMERICAN POLITICS* 260-61 (2003).

167. Congress did precisely this in the wake of the Soviet Union's collapse. See generally Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act of 1992, Pub. L. No. 102-511, 106 Stat. 3320 (1992).

committees during negotiation of nontariff trade agreements and notify Congress before entering into any such agreement.”<sup>168</sup> This would “give U.S. trading partners confidence in [the President’s] mandate and ability to obtain approval of [trade agreements].”<sup>169</sup> This authority would undoubtedly ease the executive branch’s efforts as it seeks to provide U.S. commercial inducements in exchange for Russian energy concessions.

Other possible areas for congressional action coordinated with executive efforts include advancing Russia’s interests in Iraq<sup>170</sup> and aiding Russia in its efforts to combat terrorism.<sup>171</sup> Most scholars agree that even if Russia frustrates American policy in some areas, the use of congressional sanctions are unwise if the goal of the United States is (as it should be) to promote the closest possible ties to Russia.<sup>172</sup>

To its credit, the House of Representatives recently passed a Resolution calling upon the President to block the China National Offshore Oil

168. Lenore Sek, *Trade Promotion Authority (Fast-Track Authority for Trade Agreements): Background and Developments in the 107th Congress*, CONGRESSIONAL RESEARCH SERVICE (Issue Brief No. 10084), Dec. 7, 2001, at “Summary,” available at <http://fpc.state.gov/documents/organization/7935.pdf>. Sek further notes that “[t]he President was granted [fast-track] authority almost continuously from 1974 to 1994, but the authority lapsed and has not been renewed.” *Id.*

169. U.S. ENERGY ASS’N, *supra* note 1, at 13.

170. Of the five permanent members of the U.N. Security Council, Russia had the closest ties to Iraq prior to the U.S.-led invasion; in 2001 alone, “Russian companies signed contracts with Iraq valued at \$2.3 billion.” Allison Ehlert, *Iraq: At the Apex of Evil*, 21 BERKELEY J. INT’L L. 731, 736 (2003). Russian interests, including LUKoil, are now in discussions with Iraq’s interim government in an effort to reverse the Iraqi government’s cancellation of contractual deals. Sandra T. Vreedenburgh, *The Saddam Oil Contracts and What Can Be Done*, 2 DEPAUL BUS. & COM. L.J. 559, 570 (2004). Although it is beyond the scope of this Note to debate the merits of Russo-U.S. relations in Iraq, it is noteworthy here that the United States might ease its progress into the Russian energy market by aiding Russia’s interests in Iraq. This is perhaps unlikely, however, since the U.S. Congress has already called for the cancellation of Iraq’s debts to Russia, among others. (Russia, incidentally, was one of Iraq’s two largest creditors prior to the invasion.) *Id.* at 589. Congress should at least rethink this declaration in light of the new energy paradigm.

171. The Bush Administration has declared that “the United States stands ‘shoulder to shoulder’ with Russia in the war on terrorism.” Associated Press, *U.S. Stands with Russia in Terror War, Bush Says*, INDIANAPOLIS STAR, Sept. 13, 2004, at A5. Russia’s terrorist problems in Chechnya may provide a common link, or a difficult wedge, in relations between the United States and Russia. There is no inherent reason why the United States could not gain a valuable ally in the war on terror while simultaneously easing ties with Russia in other fields. The United States must not be tempted, however, to ignore human rights abuses or anti-democratic impulses in the Russian government should these problems emerge. See Orde Kittrie, *U.S. Needs a Free Russia*, AZCENTRAL.COM, Feb. 24, 2005, available at <http://eurasia21.com/cgi-bin/news/print.cgi?ID=1955>. Congress should carefully weigh the merits of an intelligence alliance with Russia and the implications this could have for U.S. progress within the Russian energy market.

172. See generally Raj Bhala, *Fighting Bad Guys with International Trade Law*, 31 U.C. DAVIS L. REV. 1 (1997).

Corporation's attempt to purchase the Unocal Corporation.<sup>173</sup> It is therefore apparent that Congress is at least minimally aware of China's potential threat to U.S. energy security. It nevertheless took a discrete event (in this case, China's attempted purchase of a major American energy interest) to jumpstart congressional action. In the future, Congress must use its authority more proactively in lawmaking and oversight to anticipate challenges that China will pose, as well as opportunities that may exist in Russia. Thus far, Congress has been merely reactive and has largely yielded the initiative in this field to the executive branch.

4. *Public Relations in Russia.*—As noted above,<sup>174</sup> one of the fundamental problems with contemporary U.S. foreign policy is the de-emphasis of the role of persuasion. Some in Washington apparently feel that the United States need not bother to persuade other nations to adopt its preferred international policies. Yet the immutable fact remains that when a conflict is largely cultural, the solution must be largely cultural.

One such cultural element exists as a barrier to U.S. investment in Russia. Although "transplanted" legal reforms may take hold in another country when properly introduced,<sup>175</sup> the Russian culture embraces a jurisprudence significantly different from that of the United States<sup>176</sup> If America is to maximize the probability of success in forging a new alliance with Russia, it must be acutely aware of these cultural and legal differences.

Of the world's modern governments, "the Russian state is arguably the most bankrupt in terms of voluntary trust."<sup>177</sup> U.S. officials should note that "[f]illing the vacuum of trust left in the wake of Soviet power will require a careful rethinking of commercial communications and commitments[]" and that "[a]t the heart of these initiatives lay a government commitment, to all parties involved in a given industry, that long-term benefits will be shared."<sup>178</sup> America should also be aware that "[u]nderlying the success of [such appeals in Southeast Asia] was the perception of economic success as a shared goal[,]" because "each country's leaders were able to mobilize the population by conveying the importance of economic growth, touting it as even a national security concern."<sup>179</sup> Dignified appeals of self-interest can successfully mold public opinion, even in matters of economic strategy.

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173. H.R. 344, 109th Cong. § 721 (2005). The President is empowered by section 721 of the Defense Production Act of 1950 "to . . . prohibit any foreign acquisition, merger, or takeover of a United States corporation that threatens the national security of the United States." *Id.* Resolution 344 expressed the House's sense that President Bush should block Chinese acquisition of Unocal since China would be able to "take action that would threaten to impair the national security of the United States." *Id.*

174. *See supra* text 22-23.

175. *See generally* Markovits, *supra* note 157.

176. *See supra* notes 157-58 and accompanying text.

177. Cors, *supra* note 143, at 623.

178. *Id.* at 624.

179. *Id.* at 625.

In the case of America's potential ally in Moscow, there is a "fundamental suspicion many Russians have toward foreign investment."<sup>180</sup> The U.S. government, in appealing both to the Kremlin and to the Russian public, must combat this image if it is to forge a truly strong alliance with Russia on matters from energy to security. One scholar notes that

[b]y explicitly discussing specific projects (like individual pipelines) or laws that we [America] favor (like PSA legislation) in bilateral meetings, we give the impression that we care less about improvement in fundamental conditions—like the rule of law, transparency, more political openness—that will lead to a better investment climate . . .<sup>181</sup>

From official intergovernmental negotiations to a concerted, government-sponsored public relations campaign in Russia, America must be sensitive to the needs of the target audience. America must sell an idea—that the United States and Russia must forge a new alliance centered around the security and economic prosperity of both—before it can do business with the Russian energy market.

The details of this persuasive strategy must evolve as opportunities to sell the foregoing ideas arise. There are many potential avenues for communicating the importance of ideas such as property and contract rights for foreign investors. First, the President should direct executive branch officials to study and bear in mind Russia's cultural dimensions. Also, Congress should consider appropriating funds to be spent in a direct public relations media campaign in Russia; the informed voices of American and Russian energy interests operating in (or attempting to enter) Russia would prove useful in devising such a campaign. Congress might even go so far as to proactively expand foreign exchange programs with budding Russian attorneys.<sup>182</sup>

In any event, the United States must make an aggressive effort to treat Russian officials and the Russian public as dignified, intelligent equals, *even if* the two nations are, in fact, not political or economic equals. Neither the American public nor its elected representatives would respond well to an overbearing, arrogant, or culturally-ignorant "foreigner." America's Russian counterparts have the same perception. In smoothing the way for the acceptance of ideas necessary to a closer Russo-American relationship, U.S. policymakers cannot afford to focus exclusively upon the substantive policy changes they would like to affect in Russia. When cultural differences obstruct political and commercial intercourse, then cultural considerations must be part of the solution.

#### IV. CONCLUSION: AMERICA AS ONE POINT OF THE TRIANGLE

A new international energy paradigm is emerging. The United States will soon likely find itself engaged in an intense competition with the next great

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180. Kovatch, *supra* note 160, at 1034.

181. Chow Statement, *supra* note 152.

182. See generally Jane M. Picker & Sidney Picker, Jr., *Educating Russia's Future Lawyers—Any Role for the United States?*, 33 VAND. J. TRANSNAT'L L. 17 (2000).

power, China, in politics, economics, technology, and culture. At the base of this competition—at the base of the very security and existence of both—is the ability of each to fuel its economy and military. In this respect, a third crucial nation arises: Russia.

The United States must quickly forge a secure alliance with Russia and with other potential energy allies to fare well in this competition. The time to do so is now. America's strategy will require a variety of legal devices and legal reforms; yet the ultimate success or failure of the United States will rest with its powers of political persuasion.

In pursuing closer ties to Russia, America should seek greater economic relations. The United States should lobby Moscow for several general changes to Russian law, including a more transparent and explicit recognition of the property and contract rights of foreign investors. The United States should also seek a stable production sharing agreement law and legislation creating special economic zones. Both of these devices will promote investor confidence by clearly delineating the rights of monetary contributors. America should also seek reforms to pipeline regulation, inducing foreign investors to aid Russia in expanding its petroleum export capability.

Several legal mechanisms are available to the United States as it attempts to encourage Russia toward the aforementioned reforms. Russia's application to the WTO could provide a substantial lever for moving Moscow. Congress may act in a variety of ways. It should fund foreign aid and business development in Russia and should restore trade promotion authority to the President. Congress should also consider promoting Russia's commercial interests in Iraq and security interests against terrorism. Above all, U.S. policymakers must appreciate the differences in culture between the two nations and the effect this difference has upon Russian jurisprudence. Mindful of these differences, Washington should, in coordination with U.S. and Russian energy interests, launch a public relations campaign. A respectful effort of this sort could help sway Russian opinion to the reality that it is in the interests of both officials and the public in Russia to have increased foreign investment, and an ally in the United States as China continues its meteoric rise. In forging closer ties to the Russian energy market, the United States will better position itself to encourage democracy there as well.

The new triangular security strategy proposed here accounts for three states destined to play crucial roles in the twenty-first century. America's fate now lies in its foresight and in its dedication to achieving genuine security and prosperity for the free world.

# THE MOVEMENT TO OPEN JUVENILE COURTS: REALIZING THE SIGNIFICANCE OF PUBLIC DISCOURSE IN FIRST AMENDMENT ANALYSIS

WILLIAM MCHENRY HORNE\*

## INTRODUCTION

At first glance, the public's right of access to legal proceedings seems to be slipping away. The September 11 terrorist attacks have led indirectly to the closing of hundreds of deportation hearings under the rationale of national security.<sup>1</sup> News organizations have discovered "secret court" dockets in which entire cases have disappeared from public view.<sup>2</sup> These cases are not limited to national security or foreign intelligence issues. Such "super-sealing" has included the criminal conviction of a drug smuggler in Florida<sup>3</sup> and a Connecticut paternity suit involving a saxophonist in Bruce Springsteen's E Street Band.<sup>4</sup>

At the same time, for the last fifteen years or so, a quiet revolution has been spreading in juvenile and family courts across the country. The juvenile justice system has largely operated behind closed doors for much of its 107-year history.<sup>5</sup> Yet, in recent decades, a number of states—either through their legislatures or by court rule—have opened juvenile proceedings with favorable results.<sup>6</sup> In some cases, investigative news reports provided the impetus. More often, and significantly, juvenile judges and juvenile justice officials brought about the change. They have been frustrated by the absence of accountability within the

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1. See, e.g., Linda Greenhouse, *Supreme Court Roundup: Justices Allow Policy of Silence on 9/11 Detainees*, N.Y. TIMES, Jan. 13, 2004, at A-1; Laurie Kelliher, *The I.N.S. Test: What's the Price of Not Fighting for Access?*, COLUM. JOURNALISM REV., Nov.-Dec. 2003, at 6.

2. Dan Christensen, *America's Underground Legal System*, 28 NEWS MEDIA & THE LAW 11, 11 (Winter 2004).

3. *Id.*

4. Eric Rich & Dave Altimari, *Elite Enjoy 'Secret File' Lawsuits*, HARTFORD COURANT, Feb. 9, 2003, at A1.

5. See, e.g., Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155 (1999); Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1 (2001); Stephan E. Oestreicher, Jr., Note, *Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings*, 54 VAND. L. REV. 1751 (2001).

6. See, e.g., Hon. Heidi S. Schellhas, *Open Child Protection Proceedings in Minnesota*, 26 WM. MITCHELL L. REV. 631 (2000); Committee on Communications and Media Law, "Open to the Public": *The Effect of Presumptive Public Access to New York State's Family Courts*, 55 THE RECORD 236 (Mar./Apr. 2000) [hereinafter Committee].

system, the shortage of funding from legislators, and the lack of public attention to known problems.<sup>7</sup> By and large, they have concluded that secrecy benefits adults, such as welfare officials and parents—not children.<sup>8</sup>

The revolution is young. Yet the arguments favoring opening proceedings in juvenile courts suggest an element missing, or at least underemphasized, in traditional constitutional and legal analysis of the public's right of court access. This element is the importance of access in contributing to the public discourse. Problems occur when this element is missing. As family court judges discovered, out of sight is out of mind.

This Note argues that the traditional analysis of access issues, whether by courts, legislators, or legal scholars, should be broadened to include an appreciation for the contribution of open court proceedings to the public discourse—that thread of values, perspectives, and experiences that helps define who we are.<sup>9</sup> Through this interaction, we establish our concerns, our priorities, and our views about the proper order of society.

Part I reviews the development of the two-prong analysis used by the Supreme Court to decide whether a court proceeding should be open: (1) historical experience, and (2) the functional goal or logic of allowing access. Part II describes the still evolving history of juvenile court proceedings. Part III shows how a broader analysis sprang from the pragmatic concerns of juvenile judges and others involved with the juvenile justice system, as well as journalists. Part IV briefly concludes on how this broader analysis, incorporating the importance of access to the public discourse, might apply to other court access issues.

## I. CONSTITUTIONAL UNDERPINNINGS

For most of this country's history and stretching back to its English roots, public attendance at court proceedings was taken for granted. As the Supreme Court noted in *In re Oliver*:

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty.<sup>10</sup>

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7. See, e.g., Barbara White Stack, *Opening Juvenile Courts: Children Should Not Be Numbers*, COLUM. JOURNALISM REV., May-June 2002, at 62; Terry Horne (the author of this Note), *Reformists: Public Scrutiny Is Essential: Indiana Law Keeps Lid on Information That Might Help Children if Disclosed*, INDIANAPOLIS STAR, Oct. 26, 2003, at A1.

8. See, e.g., Schellhas, *supra* note 6, at 633.

9. For a discussion of the relationship between story telling, trials, and the formation of norms and values, see Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987).

10. 333 U.S. 257, 268-69 (1948).

Even at the country's start, public trials were more than a protection of liberty. They were entertainment. They were part of the public discourse that captured the imagination of the people and underlaid each generation's discussions. A painting by artist Henry Hintermeister of Andrew Hamilton defending newspaper editor John Peter Zenger in 1735 shows a packed gallery of spectators looking down upon the trial.<sup>11</sup> One hundred and seventy two years later, Irvin S. Cobb described for readers of the *New York Evening World* how a crowd of 10,000 gathered outside the Criminal Court Building and how "a sufficient number" gained admittance to the trial of New York playboy Harry K. Thaw, accused of murdering the seducer of his wife.<sup>12</sup>

Trials were presumed to be open, and the strength of that presumption could be seen in the off-handed way in which Supreme Court justices treated the issue in two cases from the 1940s. Both concerned journalists found guilty of criminal contempt after publication of articles critical of a court's action. In *Pennekamp v. Florida*,<sup>13</sup> Justice Felix Frankfurter remarked in his concurring opinion, "Of course trials must be public and the public have a deep interest in trials."<sup>14</sup> Similarly, in *Craig v. Harney*,<sup>15</sup> Justice William O. Douglas, writing for the Court, declared, "A trial is a public event. What transpires in the court room is public property."<sup>16</sup> Chief Justice Warren Burger would later take notice of both remarks when, in *Richmond Newspapers, Inc. v. Virginia*,<sup>17</sup> the Court considered whether the First Amendment gave the public a right of public access to criminal trials.<sup>18</sup>

The public access issue arose from the due process reforms of the 1960s, as trial courts began to seek ways to protect the rights of defendants from the effects of adverse publicity.<sup>19</sup> By 1979 the conflict between a defendant's rights and public access to a criminal trial came to a head in *Gannett Co. v. DePasquale*.<sup>20</sup> A Rochester, New York, judge closed a pre-trial suppression hearing in a murder case after the defendants argued that the extensive publicity was affecting their

11. Image available at <http://www.law.umkc.edu/faculty/projects/ftrials/zenger/hamilton.jpg> (last visited Jan. 21, 2006).

12. Irvin S. Cobb, "You Have Ruined My Wife!", N.Y. EVENING WORLD, Feb. 7, 1907, reprinted in A TREASURY OF GREAT REPORTING 285 (Louis L. Snyder & Richard B. Morris eds., 2d ed. 1962).

13. 328 U.S. 331 (1946).

14. *Id.* at 361 (Frankfurter, J., concurring).

15. 331 U.S. 367 (1947).

16. *Id.* at 374.

17. 448 U.S. 555 (1980).

18. *Id.* at 573 n.9.

19. In a series of cases, the Supreme Court began considering the effects of publicity on the rights of criminal defendants to a fair trial. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961).

20. 443 U.S. 368 (1979).

right to receive a fair trial. The Gannett newspaper company argued that the judge's order was unconstitutional because the Sixth Amendment guarantee of a public trial gave the public a right to attend. Gannett also argued that the First Amendment gave the public a right of access, but the Court focused on the Sixth Amendment claim.

Citing the amendment's wording, the Court concluded that the Sixth Amendment right to a public trial was limited to the accused.<sup>21</sup> It also suggested that the historical tradition of public access to trials had no relevance to whether a constitutional right was implicated.<sup>22</sup> "This history . . . ultimately demonstrates no more than the existence of a common-law rule of open civil and criminal proceedings."<sup>23</sup> In a lengthy dissent, however, Justice Harry A. Blackmun argued that the Sixth Amendment had to be interpreted in light of historical traditions and that it was indeed a guarantee of public access.<sup>24</sup> Less than a year later, the Court adopted Blackmun's historical analysis but applied it instead to a First Amendment claim.

#### A. *Grounding a Right of Access to Criminal Trials in the First Amendment*

*Richmond Newspapers* began the Court's new approach, under which the existence of a right of access was decided by determining whether the particular proceeding carried the "long tradition of openness"<sup>25</sup> or "gloss of history."<sup>26</sup> As the Court developed its analysis, a second prong was added: whether public access served the goals of the particular court proceeding at issue.<sup>27</sup>

The facts in *Richmond Newspapers* were not remarkably different than those in *DePasquale* except that *Richmond Newspapers* concerned the closure of a trial itself, rather than a pre-trial suppression hearing. The defendant's earlier conviction had been overturned on the improper admission of a blood-stained shirt, and his second and third trials had ended in mistrial. At the defendant's request, after holding a closure hearing, the judge ordered the fourth trial closed. He subsequently sustained a motion to strike the state's evidence and found the defendant not guilty.<sup>28</sup> Although he then made tapes of the trial available to the public,<sup>29</sup> seven of the eight justices who heard *Richmond Newspapers* found the closure unwarranted.<sup>30</sup> They splintered, though, on the reasons why.

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21. *Id.* at 381.

22. *See id.* at 384.

23. *Id.*

24. *Id.* at 406-48.

25. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 n.11 (1980).

26. *Id.* at 589 (Brennan, J., concurring).

27. Samuel Broderick Sokol, Comment, *Trying Dependency Cases in Public: A First Amendment Inquiry*, 45 UCLA L. REV. 881, 888-90 (1998).

28. *Richmond Newspapers*, 448 U.S. at 559-62.

29. *Id.* at 562 n.3.

30. The court's opinion, written by Chief Justice Burger and joined by Justices White and Stevens, held that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case

Chief Justice Warren Burger wrote the Court's plurality opinion. Drawing on Blackman's dissenting opinion in *DePasquale*, he retraced the long tradition of open trials. English moots, which heard cases in the days before the Norman Conquest, were town-hall meetings which were not only open; attendance by freemen was compulsory.<sup>31</sup> "Looking back, we see that when the ancient 'town meeting' form of trial became too cumbersome, 12 members of the community were delegated to act as its surrogates, but the community did not surrender its right to observe the conduct of trials[.]" Burger noted.<sup>32</sup> As the jury system evolved, English and Colonial proceedings remained public. William Blackstone and other legal scholars declared that open proceedings helped assure impartiality, discouraged perjury, and served as a check on judicial misconduct.<sup>33</sup> Burger noted also that public trials were prophylactic, "providing an outlet for community concern, hostility, and emotion."<sup>34</sup>

Unlike the Court in *DePasquale*, Burger found that this long tradition of openness, and the functions that openness served, made public attendance at criminal trials more than just a common-law rule. It was a right "implicit in the guarantees of the First Amendment."<sup>35</sup> Free speech was, at least in some contexts, a right to receive information. The government could not close courtroom doors that had been open when the First Amendment was adopted.<sup>36</sup>

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must be open to the public." *Id.* at 581. Burger's position is discussed further in this Note. Justice White wrote a brief note separately to state his support for grounding the public's right to access in the Sixth Amendment. *Id.* at 581-82 (White, J., concurring). Justice Stevens added a separate comment to emphasize the court's view that the right was not absolute. *Id.* at 582-84 (Stevens, J., concurring). "[T]he Court unequivocally holds that *an arbitrary interference* with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." *Id.* at 583 (emphasis added). Requiring a court to refrain from an arbitrary interference is, of course, different than requiring a court to articulate an overriding interest. Justice Brennan concurred only in the judgment and wrote a separate opinion, joined by Justice Marshall. *Id.* at 584-98 (Brennan, J., concurring). For reasons discussed further in this Note, he concluded that a statute authorizing "the unfettered discretion" to close courtrooms violates the First and Fourteenth Amendments. *Id.* at 598. Justice Stewart concurred only in the judgment and wrote separately to state his views that trials, both civil and criminal, are "by definition" open to the press and public, subject to time, manner, and place restrictions. *Id.* at 599-600 (Stewart, J., concurring). Justice Blackman concurred only in the judgment and wrote separately to state his view that the public has a right to open courtrooms under the Sixth Amendment and "as a secondary position" under the First Amendment. *Id.* at 603-04 (Blackmun, J., concurring). Justice Rehnquist dissented, finding no basis in the First, Sixth, or any other Amendments to override a state's decision on how to administer its judicial system. *Id.* at 606 (Rehnquist, J., dissenting). Justice Powell did not participate in the case. *Id.* at 581 (majority opinion).

31. *Id.* at 565.

32. *Id.* at 572.

33. *Id.* at 569.

34. *Id.* at 571.

35. *Id.* at 580.

36. *Id.* at 576.

It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a "right of access," or a "right to gather information" for we have recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated."<sup>37</sup>

Burger also argued that the right to attend public trials shared an "affinity"<sup>38</sup> with the right of peaceful assembly, also guaranteed by the First Amendment. "[A] trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place."<sup>39</sup>

*B. History and Function: A Two-Prong Test for Determining a Right of Access*

In a concurring opinion in *Richmond Newspapers* and in the majority opinion in *Globe Newspaper Co. v. Superior Court*,<sup>40</sup> Justice William Brennan rearranged Burger's analysis into two parts.<sup>41</sup> This framework became known as the logic and experience test or, alternatively, the history and function test.<sup>42</sup> Like Burger, Brennan believed that access to information was part of the structure of democracy. The First Amendment protected not just speech but "the indispensable conditions of meaningful communication."<sup>43</sup> Brennan was concerned, however, that such a "structural" argument could be applied to any request for information.<sup>44</sup> "For so far as the participating citizen's need for information is concerned, '[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.'"<sup>45</sup>

In Brennan's concurring opinion, the right of public access became a balancing test. On one side were logic, which was the advantages that the public's presence lends to a proceeding, and historical practice, which "implies the favorable judgment of experience" about the advantages of public access.<sup>46</sup> On the other side were specific factors favoring closure, such as the need to

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37. *Id.* (citations omitted).

38. *Id.* at 577.

39. *Id.* at 578.

40. 457 U.S. 596 (1982).

41. See, e.g., *Richmond Newspapers*, 448 U.S. at 579 (Brennan, J., concurring); *Globe*, 457 U.S. at 605-06.

42. See *Globe*, 457 U.S. at 606 (declaring "the institutional value of the open criminal trial is recognized in both logic and experience").

43. *Richmond Newspapers*, 448 U.S. at 588 (Brennan, J., concurring).

44. See Sokol, *supra* note 27, at 888.

45. *Richmond Newspapers*, 448 U.S. at 588 (Brennan, J., concurring) (quoting *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)).

46. *Id.* at 589.

protect state secrets important to national security.<sup>47</sup>

In both *Richmond Newspapers* and *Globe*, however, the structural factors favoring access to the court proceedings remained much the same. Public proceedings help maintain public confidence by assuring impartiality.<sup>48</sup> They provide an effective restraint on the abuse of judicial power.<sup>49</sup> They help ensure accurate fact-finding and honest testimony of witnesses.<sup>50</sup> They may bring matters to the attention of witnesses yet unknown to the court.<sup>51</sup>

In *Globe*, Brennan held that a Massachusetts statute violated the Constitution when it required a judge to close the courtroom during the trial of a sex crime involving a minor victim.<sup>52</sup> The defendant in the trial at issue had been charged with the rape of three teenagers, and the judge ordered the trial closed even though the victims had indicated their willingness to allow the press into the courtroom so long as their names, photographs, or personal information were not used. Brennan's opinion tracked his earlier analysis in *Richmond Newspapers*. Favoring openness were the long history of criminal trials being open and structural factors: the need for public scrutiny, the appearance of fairness, and the provision of a check against abuses of the judicial process.<sup>53</sup>

The balancing test turned specific, however, as the Court examined the interests favoring closure. As in nearly all cases implicating constitutional rights, the Court's measure was the strict scrutiny test, which requires a compelling governmental interest to be served by narrowly tailored means.<sup>54</sup> Brennan rejected the state's arguments that automatic closure was necessary to protect minor victims from further trauma and embarrassment.<sup>55</sup> In such cases, he said, trial courts should consider such factors as the victim's age, psychological maturity, the nature of the crime, the victim's desires, family interests, and the additional trauma resulting not from testifying but from testifying in public.<sup>56</sup> He also dismissed the state's contention that a rule of automatic closure would encourage minor victims to come forward.<sup>57</sup> The state had offered no empirical support for the claim, the closure rule would not guarantee privacy, and the same claim could be made about crime victims.<sup>58</sup> "The State's argument based on this interest therefore proves too much, and runs contrary to the very foundation of the right of access recognized in *Richmond Newspapers*: namely, 'that a presumption of openness inheres in the very nature of a criminal trial under our

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47. *Id.* at 598 n.24.

48. *Id.* at 595.

49. *Id.* at 592, 596.

50. *Id.* at 596.

51. *Id.* at 596-97.

52. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610-11 (1982).

53. *Id.* at 605-06.

54. *Id.* at 606-07.

55. *Id.* at 608.

56. *Id.* at 607 n.19, 608.

57. *Id.* at 609-10.

58. *Id.*

system of justice.”<sup>59</sup>

While the *Globe* court, with a more solid majority of justices,<sup>60</sup> affirmed the reach of *Richmond Newspapers*, it also opened the door to arguments favoring closure of at least some court proceedings or portions of proceedings. Chief Justice Burger’s dissent made that clear. He accepted Brennan’s characterization of the public access analysis as a balancing test involving “an assessment of the specific structural value of public access in the circumstances.”<sup>61</sup> However, he castigated the majority for ignoring “the weight of historical practice . . . of exclusion of the public from trials involving sexual assaults, particularly those against minors.”<sup>62</sup> Burger, the architect of *Richmond Newspapers*, also found the state’s interests in closing the proceedings sufficiently compelling. Citing studies about the traumatic effects of court proceedings on minor rape victims, he criticized the Court for ignoring the “undisputed problem of the underreporting of rapes and other sexual offenses.”<sup>63</sup> “There is no basis whatever for this cavalier disregard of the reality of human experience.”<sup>64</sup> As Burger’s dissent made clear, the case-by-case approach placed the public right of access to court proceedings on shakier ground.

By the time the Court decided *Globe*, at least three different versions of the history prong had emerged. One was the *Richmond Newspapers* version, in which the court analyzed history to determine if the court proceeding was a public place at the time of the First Amendment’s adoption.<sup>65</sup> The third version was the use of historical analysis to decide whether public access was a deeply rooted tradition, as in a fundamental liberties analysis.<sup>66</sup> In Chief Justice Burger’s historical analysis in *Globe*, for example, he cited cases decided from 1922 to 1969 and did not depend on practices at the time of the First Amendment’s founding.<sup>67</sup> With three different measures available, the history prong had become a tool for either side.

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59. *Id.* at 610.

60. Justices White, Marshall, Blackmun, and Powell joined the Court’s opinion; Justice O’Connor concurred in the result; Chief Justice Burger and Justices Rehnquist and Stevens dissented.

61. *Globe*, 457 U.S. at 614 (Burger, C.J., dissenting) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 597-98 (1980)).

62. *Id.*

63. *Id.* at 617.

64. *Id.*

65. See *Richmond Newspapers*, 448 U.S. at 575-80.

66. *Globe*, 457 U.S. at 605.

67. See *id.* at 614 (Burger, C.J., dissenting) (discussing whether the history revealed an unbroken and uncontradicted history of open proceedings). The line between these versions is not always a bright one, as different justices sometimes incorporate two or more versions in their analysis. For example, Justice Brennan pays homage to the first version in noting that the Constitution carries the “gloss of history.” *Id.* at 605 (majority opinion).

*C. Conclusion: The Lingering Legacy of Uncertainty of the Two-Prong Test*

The Supreme Court returned to the issue of public access to criminal proceedings twice more before it was finished. Both times Burger wrote the majority opinion, and the confusion over the historical prong remained. In *Press-Enterprise Co. v. Superior Court* (“*Press I*”),<sup>68</sup> the Court held that voir dire proceedings, like the main part of a criminal trial, were entitled to a presumption of openness.<sup>69</sup> As in *Richmond Newspapers*, Burger traced the roots of juror panels to the pre-Norman moots. In *Press-Enterprise Co. v. Superior Court* (“*Press II*”),<sup>70</sup> the Court held that a right of public access attached to preliminary hearings as conducted in California.<sup>71</sup> Here, however, Burger looked to more recent history: the practice of California and other states as well as the 1807 treason trial of Aaron Burr.<sup>72</sup> Dissenting, Justice Stevens found this approach unconvincing. It was “uncontroverted that a common-law right of access did not inhere in preliminary proceedings at the time the First Amendment was adopted.”<sup>73</sup>

The dissenting opinions in *Globe* and *Press II*, while gathering only limited support, underscored the uncertainty that would remain about the right of public access in other court proceedings, at least those in which the historical record was less certain. As one judge and scholar noted, the two-prong test led lower courts to contradictory conclusions. “Practices in the past were not as uniform as one Justice or another occasionally has claimed,” U.S. District Judge Kimba Wood remarked in a 1995 lecture.<sup>74</sup> History can also be irrelevant to court proceedings that have no historical counterpart.<sup>75</sup> The functions of some proceedings have changed dramatically, perhaps requiring access where none was formerly needed.<sup>76</sup> Wood notes, for example, that many cases are resolved by plea bargaining.<sup>77</sup> “[T]hus, it is there that most of the workings of justice occur for the overwhelming majority of criminal defendants.”<sup>78</sup>

The structural prong also falls short of providing a certain answer to the access inquiry. As supporters of confidential proceedings have sometimes pointed out, the structural goals of public oversight, checking judicial abuse, and providing information can be met in other ways.<sup>79</sup> Disciplinary commissions

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68. 464 U.S. 501 (1984).

69. *Id.* at 513.

70. 478 U.S. 1 (1986).

71. *Id.* at 13.

72. *Id.* at 10.

73. *Id.* at 22 (Stevens, J., dissenting).

74. Hon. Kimba M. Wood, *The 1995 Justice Lester W. Roth Lecture: Reexamining the Access Doctrine*, 69 S. CAL. L. REV. 1105, 1111-15 (1996).

75. *Id.* at 1115.

76. *Id.*

77. *Id.* at 1113.

78. *Id.*

79. See, e.g., Kathleen M. Laubenstein, Comment, *Media Access to Juvenile Justice: Should*

provide a check on abuse and some measure of oversight.<sup>80</sup> Transcripts can fulfill the goal of information and oversight. None of these procedures provides the immediacy or public impact that an open courtroom may bring. The Court's test fails to take full measure of the importance of public proceedings.

## II. ONCE AROUND THE BLOCK: A BRIEF HISTORY OF JUVENILE COURT PROCEEDINGS

On a constitutional level, history sheds little light on whether juvenile court proceedings should be open. Most scholars trace the beginning of a separate justice system for children to the Illinois Court Act of 1899, which established a juvenile court in Cook County.<sup>81</sup> Prior to that, delinquent or suffering children usually appeared before the same courts overseeing adult conduct.<sup>82</sup> Supporters of open courts often begin their historical analysis in colonial America or as far back as thirteenth century England. Supporters of closed courtrooms usually begin their analysis in the last century<sup>83</sup> with the creation of a separate juvenile judicial system, which was civil rather than criminal, sought to treat rather than punish, and, more often than not, operated behind closed doors. Yet even over this last 100 years, the judgment of history is not settled. In Chicago, for example, the very birthplace of this civil, medical treatment model, juvenile courts were, and remained, open by law to the press and the victim.<sup>84</sup> At best, the history of juvenile justice is a record of changing concerns and values.

### A. Early Roots: England and America

The 1839 case of *Ex parte Crouse*<sup>85</sup> illustrates the ambiguity of historical analysis. The 1839 Pennsylvania Supreme Court decision, some sixty years before juvenile courts began, is often cited as an early American case upholding *parens patriae*.<sup>86</sup> This English doctrine, which juvenile court supporters would use to justify the authority of juvenile courts, loosely translates as "country as the parent" and stands for the government's authority as the ultimate guardian of the

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*Freedom of the Press Be Limited to Promote Rehabilitation of Youthful Offenders?*, 68 TEMPLE L. REV. 1897, 1906 (1995).

80. *Id.*

81. Bean, *supra* note 5, at 30; *see* 1899 Ill. Laws § 3.

82. CLIFFORD E. SIMONSEN & MARSHALL S. GORDON III, JUVENILE JUSTICE IN AMERICA 9 (1979).

83. *See, e.g.,* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring) ("It is a hallmark of our juvenile justice system . . . that virtually from its inception . . . its proceedings have been conducted outside of the public's full gaze . . .").

84. 705 ILL. COMP. STAT. 405/1-5(6) (2004); *see also* Sokol, *supra* note 27, at 910 (citing Hon. Richard S. Tuthill, *History of the Children's Court in Chicago*, INT'L PRISON COMM'N, CHILDREN'S COURTS IN THE UNITED STATES, H.R. DOC. No. 58-701, at 3 (1904)).

85. 4 Whart. 9 (Pa. 1839).

86. *See, e.g.,* Bean *supra* note 5, at 24.

country's children.<sup>87</sup> The *Crouse* court affirmed this doctrine in upholding the commitment of sixteen-year-old Mary Ann Crouse to the Philadelphia House of Refuge, a juvenile reform school.<sup>88</sup> The court held that *parens patriae* allowed the termination of the rights of parents unable or unworthy of taking care of their children.<sup>89</sup>

Of more importance to historical inquiry is what the court left unsaid. The case arose when Crouse's father filed a habeas corpus petition to free his daughter from the reformatory.<sup>90</sup> The court's opinion indicates that the sixteen-year-old girl had been committed to the House of Refuge merely because her mother filed a complaint with a justice of the peace.<sup>91</sup> In *Ex parte Crouse*, questions about public access as well confidentiality were irrelevant.

Early English and American history is equally ambiguous. In England through the early nineteenth century, children as young as seven years were treated little differently than adults when they committed crimes.<sup>92</sup> Youth in London appeared in Old Bailey for trial.<sup>93</sup> Ten-year-old girls were sent to the infamous Newgate Prison.<sup>94</sup> Pre-adolescent thieves were shipped to Australia.<sup>95</sup> In America, juvenile offenders were treated just as harshly.<sup>96</sup> Given the lack of disparate treatment between adults and children, the appearance of such children in open courts provides little guidance about the "favorable judgment of experience."

Social welfare also was applied with little distinction between adults and children. Under the Elizabethan Poor Laws, the poor who were unable or unwilling to provide for themselves were shipped to workhouses,<sup>97</sup> which were designed to be "so psychologically devastating and so morally stigmatizing that only the truly needy would request it."<sup>98</sup> Children were not spared. The record of one English workhouse in 1799 listed thirty-eight children under ten years old

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87. ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* 63 (1978).

88. *Crouse*, 4 Whart. at 11.

89. *Id.*

90. *Id.* at 9.

91. *Id.*

92. See, e.g., SIMONSEN & GORDON, *supra* note 82, at 9-13.

93. *Id.* at 9. The authors note that many children were even sentenced to death. However, records do not show how many were actually executed, and the number of children tried at Old Bailey was small compared to the number of adults.

94. *Id.* at 13.

95. *Id.* at 10-13.

96. *Id.* at 16-20.

97. William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73, 100-03 (1996).

98. Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom of Contract*, 24 J. LEGAL STUD. 283, 310 (1995).

among its 136 paupers.<sup>99</sup> Unemployed or neglected children could be bound out as apprentices upon a finding by two justices of the peace that their parents were unfit.<sup>100</sup> American colonists also “relied on forced apprenticeships and institutional ‘houses’ to deal with the children of the poor.”<sup>101</sup>

Finding little similarity between English poor laws and modern juvenile court proceedings, some scholars looked to the history of English chancery courts exercising jurisdiction over guardianships, but the “gloss of history” is uncertain here as well. Some scholars characterized early guardianship proceedings as family law for the wealthy.<sup>102</sup> Others have pointed out that these chancery proceedings, at least initially, were more concerned with the disposition of property than the welfare of children.<sup>103</sup>

Even by the nineteenth century, most child advocates worried little about whether court proceedings should be open even as they sought better ways to deal with delinquent and neglected children. Some were motivated by both humanitarianism and fear.<sup>104</sup> In 1825, the Society for the Prevention of Pauperism of New York established the New York House of Refuge,<sup>105</sup> a juvenile reform school. Similar houses were established in most large cities over the next twenty-five years.<sup>106</sup> Other “child-saving” groups, such as societies for the prevention of cruelty to children, formed “cottage reform schools,” and organized programs to place delinquent or vagrant children on western farms.<sup>107</sup> To these Jacksonian reformers, children were innocent but imbued with moral capacity that could be developed by removing them from the evils of their surroundings.<sup>108</sup> Yet many of the institutions these reformers launched became known for the same harshness and cruelty that had marked the workhouses. As one scholar noted, “[T]he fusion of social control with greater humaneness is a tenuous one which typically dissolves, leaving the machinery for social control firmly entrenched—even if it is ineffective—after the spirit of humanitarianism has departed.”<sup>109</sup>

### *B. Separate Justice: American Juvenile Courts*

In 1904, Cook County Circuit Court Judge Richard S. Tuthill described for

99. Quigley, *supra* note 97, at 111.

100. *Id.* at 102.

101. Bean, *supra* note 5, at 23.

102. See, e.g., Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, JUVENILE AND FAMILY COURT J. (Fall 1998), reprinted at <http://naccchildlaw.org/documents/evolutionofthependencycourt.doc>.

103. Bean, *supra* note 5, at 18.

104. *Id.* at 27-30.

105. SIMONSEN & GORDON, *supra* note 82, at 20.

106. *Id.* at 21.

107. See *id.* at 20-24; Bean, *supra* note 5, at 24-29; RYERSON, *supra* note 87, at 27-30.

108. RYERSON, *supra* note 87, at 28-30.

109. *Id.* at 33.

the International Prison Commission the operation of the nation's first juvenile court, established just five years earlier:

The hearing of the case is in the open court, but with little of the formality usually observed in court proceedings. I have always felt and endeavored to act in each case as I would were it my own son that was before me in my library at home charged with some misconduct. . . . I first speak to him in a kindly and considerate way, endeavoring to make him feel that there is no purpose on the part of anyone about him to punish, but rather to benefit and help, to make him realize that the State—that is the good people of the State—are interested in him, and want to do only what will be of help to him now and during his entire life.<sup>110</sup>

Such was the beginning of a separate juvenile court system. Little formality. A goal of instruction rather than punishment. Open to the public. By 1925, forty-six of the forty-eight states had established juvenile courts.<sup>111</sup> While most shared Tuthill's fondness for informality and therapy, most also operated behind closed doors, even in the face of state constitutions mandating open courts.<sup>112</sup> In Indiana, for example, the 1903 act creating the state's first juvenile court required all trials to be held in the juvenile court or in chambers and empowered the judge to exclude "any and all persons that in his opinion are not necessary for the trial of the case."<sup>113</sup> Court officials and legislators came to view confidentiality as necessary.

1. *The Progressive Model.*—The emphasis upon secrecy stemmed partly from the middle class moralism underpinning much of the Progressive movement<sup>114</sup> and partly from the Progressive faith in the newly emerging social sciences of psychology, sociology, and education.<sup>115</sup> The Progressives were fascinated by the promise of the industrial revolution and the attending growth of American cities even as some were repelled by what they saw as its evils.<sup>116</sup> To some, city government too often was a corrupt system that exploited the immigrant underclass for its own ends, and that ruled by political chicanery rather than merit.<sup>117</sup> Such politics offended middle class sensibilities about honesty,

110. Tuthill, *supra* note 84, at 3.

111. Kara E. Nelson, Comment, *The Release of Juvenile Records Under Wisconsin's Juvenile Justice Code: A New System of False Promises*, 81 MARQ. L. REV. 1101, 1119-20 (1998).

112. In Chicago, the juvenile courts remained open, by statute, to the victim and news media. 705 ILL. COMP. STAT. 405/1-5(6) (2004); *see also* Barbara White Stack, *In Illinois, Acceptance*, PITTSBURGH POST-GAZETTE, Sept. 24, 2001, at A4.

113. 1903 IND. ACTS 519-20.

114. *See* ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877-1920*, at 59-62 (1967).

115. *See id.* at 127-32, 166, 169-70.

116. Frederic C. Howe, *The City*, in *THE PROGRESSIVE YEARS: THE SPIRIT AND ACHIEVEMENT OF AMERICAN REFORM*, 25, 25-26 (Otis Pease ed., 1962).

117. *Id.*; *see, e.g.*, ANTHONY M. PLATT, *THE CHILD SAVERS—THE INVENTION OF DELINQUENCY* 91 (1969).

hard work, and family.<sup>118</sup> Early advocates of juvenile courts wanted a juvenile system removed from the noisy, rumble-tumble politics associated with adult courts.<sup>119</sup>

From the first, these courts and child advocates worried about the effects of stigmatization,<sup>120</sup> an extension of their belief that the source of the child's problems was external. Removing the stigma of criminality was seen as a goal in itself, as Judge Julian W. Mack wrote in 1909:

To get away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma,—this is the work which is now being accomplished by dealing even with most of the delinquent children through the court that represents the *parens patriae* power of the state, the court of the chancery.<sup>121</sup>

This emphasis upon “stigmatization” as a major evil, if not the cause of bad behavior, was perhaps the strongest reason secrecy came to envelop many juvenile courts. It was far easier for these Progressives to erase public “stigma” by removing offending juveniles from public view than by reforming public sentiment. Even language was used to disguise or obscure.<sup>122</sup> Youth who broke laws became “delinquents.”<sup>123</sup> Officials sought to portray the proceedings as civil, rather than criminal.<sup>124</sup> This Progressive rhetoric remains today. When “delinquent” developed a pejorative ring, welfare officials began using terms such as “children in need of services,” “persons in need of supervision,” or a similar term.<sup>125</sup> A Maryland juvenile court website declares that delinquency proceedings are civil, not criminal.<sup>126</sup> It provides a list of the special terms used to avoid the “taint of criminality.”<sup>127</sup> As the Supreme Court remarked, the Progressives launched our juvenile court system with “the highest motives and the most enlightened impulses.”<sup>128</sup> But the closed “civil” system they created was

118. See WIEBE, *supra* note 114, at 167-68.

119. See, e.g., Tuthill, *supra* note 84, at 1.

120. See, e.g., Oestreicher, *supra* note 5, at 1767-68.

121. Hon. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909).

122. See IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES, RETHINKING THE BEST INTERESTS OF THE CHILD 150-52 (1989); Carrie T. Hollister, *The Impossible Predicament of Gina Grant*, 44 UCLA L. REV. 913, 920 (1997); Oestreicher, *supra* note 5, at 1763-64.

123. See, e.g., Hollister, *supra* note 122, at 920.

124. See, e.g., Nelson, *supra* note 111, at 1115.

125. See *In re Gault*, 387 U.S. 1, 24, 24 n.31 (1967). Although some states distinguish between dependency (neglect or abuse) cases and juvenile criminal cases, other states use the same terms interchangeably or with slight variation.

126. COURT INFORMATION OFFICE, JUVENILE COURT IN MARYLAND 3 (2003), available at <http://www.courts.state.md.us/juvenile.pdf>.

127. *Id.*

128. *Gault*, 387 U.S. at 17.

a “peculiar system for juveniles, unknown to our law in any comparable context.”<sup>129</sup>

2. *The Due Process Movement: Constitutional Concerns About the Quasi-Criminal Court.*—From the start, observers and even participants in this new juvenile court system questioned its ability to fulfill its goals and the validity of its rhetoric.<sup>130</sup> These doubts did not come to a head, however, until the 1960s when the Supreme Court examined whether “this peculiar system” was immune to due process concerns about fundamental fairness.<sup>131</sup> In a series of cases, the Court rejected the Progressive model of an “informal” court that could play by its own rules.<sup>132</sup> It stopped short of finding that juvenile courts had to mirror adult courts in all respects. It did not consider whether proceedings had to be open. Yet underpinning the Court’s rulings was a pragmatic realization that the juvenile system, which had maintained its tradition of informality and secrecy, was suffering.<sup>133</sup>

In *Kent v. United States*,<sup>134</sup> a District of Columbia juvenile judge had waived a sixteen-year-old rape suspect to adult court without holding a hearing, as requested by the boy’s attorney.<sup>135</sup> Nor did the judge provide any findings showing that he considered evidence that the boy was mentally ill. The Supreme Court held “there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.”<sup>136</sup>

The Court noted the shortcomings of the juvenile court system in practice, despite its “laudable” social welfare purpose.<sup>137</sup> “[S]tudies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults.”<sup>138</sup> Children caught in the juvenile system were getting “neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”<sup>139</sup> Despite such statements, the Court ruled that the juvenile in *Kent*

129. *Id.*

130. RYERSON, *supra* note 87, at 138.

131. *See, e.g.,* Oestreicher, *supra* note 5, at 1787-92.

132. In *McKeiver v. Pennsylvania*, 403 U.S. 528, 531 (1971), the Supreme Court traced a line of six due process cases involving juveniles: *Haley v. Ohio*, 332 U.S. 596 (1948); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Kent v. United States*, 338 U.S. 541 (1966); *Gault*, 387 U.S. 1; *DeBacker v. Brainard*, 396 U.S. 28 (1969); and *In re Winship*, 397 U.S. 358 (1970).

133. In *McKiever*, the Court remarked on this motivation, quoting a state court’s gloss that *Gault* “evidences a fundamental and far-reaching disillusionment with the anticipated benefits of the juvenile court system.” 403 U.S. at 538 (quoting *In re Terry*, 265 A.2d 350, 352 (Pa. 1970)).

134. 383 U.S. 541 (1966).

135. *Id.* at 546.

136. *Id.* at 554.

137. *Id.* at 555.

138. *Id.*

139. *Id.* at 556.

was entitled to a hearing not because of constitutional guarantees, but because the District's juvenile court statute required one.<sup>140</sup>

Only a year later, however, the Court found that juvenile courts did have to abide by the Fifth and Sixth Amendment rights to notice, counsel, to confront and examine witnesses, and to maintain a privilege against self-incrimination in *In re Gault*.<sup>141</sup> *Gault* concerned a juvenile judge who had sent a fifteen-year-old boy to a juvenile reformatory for "the period of his minority."<sup>142</sup> The boy was already on probation for another offense when the judge determined, on the basis of two exceedingly informal hearings, that the boy had called a neighbor and made lewd comments over the telephone. It was, as the Court noted, effectively a six-year sentence on a crime for which the adult penalty was a maximum of a \$50 fine or two months in jail.<sup>143</sup> As it had in *Kent*, the Court contrasted the noble goals of juvenile court with the reality of an overworked system often lacking in professionalism.<sup>144</sup> "[T]here is substantial question as to whether fact and pretension, with respect to the separate handling and treatment of children, coincide."<sup>145</sup> The Court reasoned that such a system would certainly not be hurt "by constitutional domestication."<sup>146</sup>

The Court's willingness to hold juvenile courts to the same standard as adult courts soon came to a screeching halt. The Court had declared in *Gault* that its juvenile court cases "unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."<sup>147</sup> Yet in *McKeiver v. Pennsylvania*,<sup>148</sup> decided just four years later and involving a group of juvenile cases from Pennsylvania and North Carolina, the Court held that the Sixth Amendment right to a jury trial, through the Fourteenth Amendment, did not apply to juvenile proceedings.<sup>149</sup> The Court clearly stated that it was not yet ready to abandon entirely the Progressives' lofty goals for a therapeutic system that would treat rather than punish.<sup>150</sup> "The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise . . . ."<sup>151</sup>

Although the Court appeared indifferent, or at times ambivalent,<sup>152</sup> about

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140. *Id.*

141. 387 U.S. 1 (1967).

142. *Id.* at 7-8.

143. *Id.* at 29.

144. *Id.* at 17-18. The Court cited a study, for example, that half of the 2987 juvenile court judges in 1964 lacked an undergraduate degree. *Id.* at 15 n.14.

145. *Id.* at 22 n.30.

146. *Id.* at 22.

147. *Id.* at 13.

148. 403 U.S. 528 (1971).

149. *Id.* at 551.

150. *Id.* at 547.

151. *Id.*

152. Compare *Gault*, 387 U.S. at 25, with *Kent v. United States*, 383 U.S. 541, 564 n.32 (1966).

public access, these cases, *Gault*, *Kent*, and *McKeiver*, betrayed its concern about systemic problems arising from the lack of funding, public participation, and public awareness. “The community’s unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alternatives, and our general lack of knowledge all contribute to dissatisfaction with the experiment.”<sup>153</sup> In coming decades, juvenile court judges lodged similar complaints as they argued that the time had come to let the public see what was going on.

### III. OPEN JUVENILE COURTS: REALIZING THE IMPORTANCE OF PUBLIC DISCOURSE

The secrecy enveloping most American juvenile courts can come as a shock to people when they first experience it—even judges. Heidi Schellhas, now a district judge<sup>154</sup> in Hennepin County, Minnesota, was struck by the closed nature of the proceedings the first or second time she appeared in a juvenile court after being appointed to an ad litem panel in 1989.<sup>155</sup> She wondered if the welfare department policies reflected public concerns and values, and, if not, how the public would ever find out.<sup>156</sup> “I just remember standing in the courtroom thinking this was horrible that it was shrouded in secrecy. . . . I was really very angry about it.”<sup>157</sup> For a former Indiana judge, James W. Payne,<sup>158</sup> the eye-opener was a phone call he made to a welfare worker shortly after he became judge of the Superior Court’s juvenile division in Marion County, which includes all of Indianapolis, the state’s largest city.<sup>159</sup>

I called the caseworker just to ask a question. Twenty-five minutes later, someone finally came on the phone and told me nothing. I found out later, you’re not supposed to talk to those people, and while I was on hold, they had had a hurried meeting to figure out what they were going to say. . . . It was my first understanding of what this issue of confidentiality was about. It turns out that it’s really not so much about

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153. *McKeiver*, 403 U.S. at 544.

154. Schellhas previously served as judge in the criminal division from 1996-97 and in the juvenile division from 1998-2002. See Hennepin County Bar Association, A View of the Hennepin County Bench, Judge Heidi Schellhas, <http://www.hcba.org/District%20Court/Schellhas-Heidi.htm> (last visited May 18, 2006).

155. Telephone Interview with Hon. Heidi Schellhas, District Judge, Hennepin County (Feb. 28, 2005) [hereinafter Schellhas Telephone Interview].

156. *Id.*; E-mail from Hon. Heidi Schellhas, Fourth Judicial District Judge, Hennepin County, Minn., to the author (Mar. 22, 2005) (on file with author).

157. Schellhas Telephone Interview, *supra* note 155.

158. Payne took office on January 11, 2005, as director of the Indiana Department of Child Services. Tim Evans, *Child Services Chief Says He's Committed to Reforming System*, THE INDIANAPOLIS STAR, Jan. 12, 2005, at B1.

159. Telephone Interview with Hon. James W. Payne, former Superior Court Judge, Marion County (Oct. 2003) [hereinafter Payne Telephone Interview].

kids or their identity. It's about protecting the system.<sup>160</sup>

Over the last twenty-five years, a growing number of juvenile court judges, such as Schellhas and Payne, have concluded that the secrecy harms children and the juvenile court system. They have become advocates of an open court movement that has led to substantive changes in several states and influenced judges in other states to open their courtrooms to the extent allowed by law. They have justified these changes through traditional Supreme Court analysis about the benefit of open proceedings to the judicial process. Yet juvenile court judges' concerns go deeper. The impetus for change has been their frustration about stagnation. Secrecy allowed juvenile issues to fall from the public's radar. They began to appreciate the interplay between conflict in a public setting such as the courtroom and the formation of community concerns. They learned the importance of story-telling in shaping and reflecting public awareness and debate.

### A. *The Open Courts Movement*

The movement began slowly. One of the first ripples came in 1980 when the Oregon Supreme Court struck down a state law requiring the closure of juvenile hearings unless an open forum was requested by the child or the child's parents.<sup>161</sup> The catalyst, as in subsequent reforms, was a newspaper seeking courtroom access to the hearing of a thirteen-year-old girl accused of killing a four-year-old.<sup>162</sup> The Oregon court struck down the law because a provision in the state's 1859 constitution prohibited secret courts.<sup>163</sup> Aside from a few news stories,<sup>164</sup> though, the decision attracted little attention from the legal community.<sup>165</sup> The open courts movement was still young. In 1987, reacting to a newspaper series about juvenile crime, the Michigan legislature and supreme court amended state law and court rules respectively to allow public access to juvenile court hearings and some court records.<sup>166</sup> The change, which took effect in 1988,<sup>167</sup> received little notice outside of Michigan.

Not until the next decade did the open court movement gain momentum. In 1995, a six-year-old New York City girl, Elisa Izquierdo, was beaten to death by her mother while under the protection of child welfare officials, who had received

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160. *Id.* Part of this quotation also appears in Horne, *supra* note 7.

161. *State ex rel. Oregonian Publ'g Co. v. Deiz*, 613 P.2d 23 (Ore. 1980).

162. *Id.* at 25.

163. *Id.* at 26-27; *see also* ORE. CONST. art. I, § 11.

164. *See, e.g., Around the Nation, Oregon Court Voids Law Closing Juvenile Hearings*, THE N.Y. TIMES, June 19, 1980, at A16.

165. A Lexis search conducted March 19, 2006, turned up only eight law review articles citing *Oregonian Publishing Co. v. Deiz*, the earliest of which was published in 1984.

166. Jack Kresnak, *Juvenile Justice: How Journalists Can Negotiate the Juvenile Justice System*, in COVERING CRIME AND JUSTICE (Criminal Justice Journalists ed., 2003), available at [http://www.justicejournalism.org/crimeguide/chapter02/chapter02\\_pg05.html](http://www.justicejournalism.org/crimeguide/chapter02/chapter02_pg05.html).

167. KAY FARLEY, NATIONAL CENTER FOR STATE COURTS, ISSUE BRIEF: PUBLIC ACCESS TO CHILD ABUSE AND NEGLECT PROCEEDINGS 12 (2003).

allegations of prior abuse.<sup>168</sup> The extensive media coverage about this case led the New York legislature to pass Elisa's Law, allowing the disclosure of information about child abuse investigations when the child dies or abuse charges are filed.<sup>169</sup> Seven other states had already adopted similar rules.<sup>170</sup> Even more significantly, however, the New York Court of Appeals in 1997 and the Minnesota Supreme Court in 1998 adopted new rules that effectively opened most juvenile hearings in New York and juvenile protection hearings in Minnesota.<sup>171</sup> In both states, juvenile or family court judges were among those who recognized the importance of access.

In New York, the rule changes were prompted at least in part by three highly publicized cases in which family court judges decided to open their courtrooms only to see their decisions overturned at the appellate court level.<sup>172</sup> One was the child protection hearings involving Elisa's siblings.<sup>173</sup> The others were the 1993 child protective hearing involving Katie Beers, a ten-year-old Long Island girl who was kidnapped, abused, and held by a neighbor in an underground dungeon and the 1995 custody hearing concerning teen-aged movie star Macauley Culkin and his siblings.<sup>174</sup>

All three trial judges offered similar reasons for allowing public access. Closure would undermine public confidence.<sup>175</sup> The identities and circumstances of the cases were already public knowledge.<sup>176</sup> Open courtrooms help educate the public about the workings of the family court.<sup>177</sup> All three appellate courts ruled that closure was required to protect the children from further psychological harm

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168. David Firestone, *Two Child Welfare Employees Are Suspended in Abuse Death*, N.Y. TIMES, Apr. 30, 1996, at A1; see also Committee, *supra* note 6, at 250.

169. Liam Plevin, *No More Elisas, Albany Deal to Loosen Secrecy in Child Abuse Case Files*, NEWSDAY (New York), Feb. 1, 1996, at A3; N.Y. SOC. SERV. § 422-a (Consol. 2006).

170. *States End Deadly Silence That Has Cost Kids' Lives*, USA TODAY, Feb. 8, 1996, at A10.

171. N.Y. COMP. CODES R. & REGS. tit. 22 §205.4 (2006); Order Mandating Public Access to Hearings and Records in Juvenile Protections Matters, Minnesota Supreme Court, File No. C2-95-1476 (Dec. 26, 2001). Minnesota began a trial project in 1998. Order Promulgating Rule on Public Access to Records Relating to Open Juvenile Protection Proceedings, Minnesota Supreme Court, File No. C2-95-1476 (Jan. 22, 1998); see also James Walsh, *New Chief Justice's First Act Rekindles Debate over Kids' Cases*, STAR TRIBUNE (Minneapolis), Jan. 29, 1998, at B1 [hereinafter Walsh, *New Chief Justice's First Act*]; James Walsh, *Child-Protection Hearings to Open to Public Today; Proponents of Opening the Process Say It Will Help Children. Doubters Say Privacy Is More Important Than Publicity. In Reality, Little May Change*, STAR TRIBUNE (Minneapolis), July 1, 2002, at B1 [hereinafter Walsh, *Child-Protection Hearings to Open to Public Today*].

172. Committee, *supra* note 6, at 244.

173. *In re Ruben R.*, 219 A.D.2d 117, 129 (N.Y. App. Div. 1996).

174. *In re Katherine B.*, 189 A.D.2d 443, 452 (N.Y. App. Div. 1993); *P.B. v. C.C.*, 223 A.D.2d 294, 298 (N.Y. App. Div. 1996); see also Committee, *supra* note 6, at 244-45; Jonathan Rabinovitz, *Kidnapper Says He Built Cell for Girl*, N.Y. TIMES, June 17, 1994, at B1.

175. Committee, *supra* note 6, at 245-53.

176. *Id.*

177. *Id.*

that could result from a public hearing.<sup>178</sup> The cases prompted New York Court of Appeals Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman to appoint a committee to study the Family Court access issues.<sup>179</sup> In 1997, Kaye and Lippman announced new rules: New York's family courts would be open absent a compelling reason for closure that could not be satisfied by less restrictive alternatives.<sup>180</sup>

In Minnesota, the rule changes resulted from more than a year of study by a task force appointed by the state supreme court to study foster care and adoption issues.<sup>181</sup> A subcommittee, chaired by Schellhas, recommended that juvenile hearings be open.<sup>182</sup> When the state legislature failed to pass bills authorizing a pilot project, the newly appointed Chief Justice Kathleen Blatz, a former juvenile court judge herself, urged the Minnesota Supreme Court to act.<sup>183</sup> The court authorized a three-year pilot project allowing the state's judicial districts to select counties where most abuse and neglect proceedings and records would be presumed open.<sup>184</sup> In 2002, the court made the rules permanent for all Minnesota counties.<sup>185</sup>

Following the lead of New York and Minnesota, a combination of child welfare advocates, juvenile judges, prosecutors and their respective officials, as well as the media, have pressed for access to juvenile proceedings in other states.<sup>186</sup> In 1997, according to one survey, fifteen states allowed access to, or gave a judge discretion to open, court proceedings in abuse and neglect cases.<sup>187</sup> By 2003, the number had grown to twenty-three.<sup>188</sup> More importantly, in fourteen

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178. *Id.*

179. *Id.* at 254.

180. N.Y. Comp. Codes R. & Regs, tit. 22, § 205.4 (2005).

181. Schellhas, *supra* note 6, at 657.

182. *Id.* at 659-60.

183. Walsh, *New Chief Justice's First Act*, *supra* note 171; James Walsh, *New Justice Holds Children and Their Welfare as Highest Priority*, STAR TRIBUNE (Minneapolis), Nov. 4, 1996, at A1.

184. MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON OPEN HEARINGS IN JUVENILE PROTECTION MATTERS, INTRODUCTION TO FINAL REPORT OF NATIONAL CENTER FOR STATE COURTS 13 (2001).

185. Order Mandating Public Access to Hearings and Records in Juvenile Protections Matters, Minnesota Supreme Court, File No. C2-95-1476 (Dec. 26, 2001); *see also* Walsh, *Child-Protection Hearings to Open to Public Today*, *supra* note 171.

186. *See, e.g.*, Barbara White Stack, *States Lifting Veil of Secrecy in Juvenile Court; Trend for Openness Gains Momentum Nationwide, and Pennsylvania Could Be at the Forefront*, PITTSBURGH POST-GAZETTE, Sept. 23, 2001, at A-1; Matthew Franck, *Opening Family Courts Would Help Foster Care System, Proponents Say; Level of Accountability Will Rise if Public Can View Proceedings, They Say*, ST. LOUIS POST DISPATCH, Jan. 16, 2003, at B-1; Sewell Chan, *Proposal Would Open D.C. Juvenile Cases*, WASH. POST, Jan. 12, 2004, at B1.

187. FARLEY, *supra* note 167, at 3 (citing Linda Szymanski, *Confidentiality of Abuse/Neglect/Dependency Hearings*, National Center for Juvenile Justice (1997)).

188. *Id.* at 3-4 (listing twenty-three jurisdictions, counting the Virgin Islands and the Northern Mariana Islands, providing at least some access to abuse and neglect proceedings).

of those states abuse or neglect proceedings were required or presumed to be open.<sup>189</sup> Similarly, a 2004 survey reported that delinquency hearings were open to at least some degree in thirty-five states, at least for juveniles of a certain age or for certain offenses.<sup>190</sup> These surveys likely overstated the reach of the open court movement. In some states, despite statutory or even state constitutional language appearing to require a presumption of open court proceedings, journalists reported in 2003 that juvenile judges frequently barred access to court proceedings.<sup>191</sup>

### *B. Moving Beyond Traditional First Amendment Analysis*

The lines of debate over open court proceedings are well drawn. Even at their simplest, the arguments extend beyond the Supreme Court's "logic" or "functional" analysis of the benefits of public access. The principal reasons usually offered for public access can be characterized as "sunshine," practicality, and validation.

Sunshine, a term frequently used by open court advocates,<sup>192</sup> is a play on Justice Louis Brandeis's oft-quoted remark, "Sunlight is said to be the best of disinfectants."<sup>193</sup> The term encompasses the benefits of public access that the Supreme Court has articulated for adult criminal trials, such as witness reliability and a guard against judicial abuse. But it also embraces a broader realization that secrecy breeds public distrust, ignorance, and apathy about the issues affecting juveniles.

Many juvenile court judges have come to see a direct link between their lack of funding and closed hearings. Attention brings dollars. The New York trial

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189. Required to be open: Oregon; presumed open: Arizona, Florida, Indiana, Iowa, Maryland, Michigan, Minnesota, Nebraska, New York, North Carolina, Texas, Utah, and Washington. *Id.*

190. Fourteen states that permitted or required juvenile delinquency hearings to be open to the public were Arizona, Arkansas, Colorado, Florida, Iowa, Michigan, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oregon, Texas, and Washington. Linda A. Szymanski, National Center for Juvenile Justice, *Confidentiality of Juvenile Delinquency Hearings (2004 Update)*, 9 NCJJ SNAPSHOTS 1 (Feb. 2004), available at <http://ncjj.servehttp.com/ncjjwebsite/pdf/Snapshots/ssconfidentiality902.pdf>. Twenty-one states that allowed the public to attend least some hearings were Alaska, California, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota, Utah, Virginia, and Wisconsin. *Id.*

191. Author's correspondence in 2003 with reporters in Alaska, Arkansas, Delaware, Indiana, New Jersey, Texas, and Washington. For example, a Dallas reporter writes, "Judges here can close [juvenile] courtrooms whenever they want. They usually don't in Dallas, but do in surrounding counties." E-mail from Jennifer Emily, Reporter, DALLAS MORNING NEWS, to Terry Horne, Reporter, INDIANAPOLIS STAR (Oct. 9, 2003) (on file with author).

192. See, e.g., Anne E. Kornblut, *Light Shines on Legal Shadowland*, DAILY NEWS (New York), Sept. 14, 1997, at 7.

193. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

judge overseeing the child protection hearing for Elisa's siblings, for example, saw complacency as a natural consequence of closure. "[S]o long as citizens suppose that a judge can make rehabilitative services materialize with the bang of a gavel, our society will come no closer to its proclaimed goal of meaningful child protection."<sup>194</sup> Likewise, Judge Payne, who oversaw the juvenile system in Marion County, Indiana, for about two decades, recalled the problems his court had in obtaining even minor additional funds from the elected officials who controlled his budget. "If the message doesn't get out, then you can't sell it. . . . Law enforcement officials have no problem getting \$3 million for this and that . . . , [but] if someone from my system goes in and asks for \$20,000, we get grilled for half an hour."<sup>195</sup>

Practicality is the notion that in many instances closing the courtroom has little utility in protecting the child from harm. As the New York judge in the case involving Elisa's siblings remarked, any decision that she made would not affect the degree of privacy afforded the family.<sup>196</sup> Details about the family had already become public. More details would become public as the mother's criminal case proceeded.<sup>197</sup> In other cases, circumstances are already known to friends, neighbors, school officials, and authorities—the community that is of concern to the victim or offender.<sup>198</sup>

When incidents involving juveniles do rise to the level of general public interest, the privacy afforded juvenile victims and offenders often depends more on media policies than on the accessibility of any subsequent proceedings. In twenty-five years as a journalist, this author has reported on numerous stories involving juveniles. Without exception, these stories became newsworthy because private details concerning the children, including their identities, were already known, either through police reports involving the children or adults, other court records, or interviews with witnesses. Somebody is talking. Often it is a family member. Closure may protect privacy, but sometimes it is only the privacy of adults.

In 1994, for example, an Indianapolis couple seeking to adopt a four-year-old girl turned to the media when Maryland child welfare workers, who had placed the child, decided to remove her from the home.<sup>199</sup> The couple had already returned the girl's two brothers, whom the couple had initially agreed to adopt as well.<sup>200</sup> The couple claimed that all three children had been abused in a former

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194. Committee, *supra* note 6, at 247 (quoting *In re Ruben R.*, unpublished Family Court decision of Dec. 11, 1995).

195. Payne Telephone Interview, *supra* note 159; part of this quote also appears in Horne, *supra* note 7.

196. Committee, *supra* note 6, at 247 (quoting from *In re Ruben R.*, unpublished Family Court decision of Dec. 11, 1995).

197. *Id.*

198. Payne Telephone Interview, *supra* note 159.

199. Terry Horne, *Media Is Couple's Last Defense in Fight*, INDIANAPOLIS NEWS, May 27, 1994, at E12.

200. *Id.*

foster placement, that they had returned the boys to protect the girl, and that Maryland child welfare workers were retaliating against them for raising such issues.<sup>201</sup> Citing privacy laws, Maryland child welfare workers repeatedly refused to comment. Court documents later revealed that Maryland authorities were concerned about what welfare workers perceived as a harsh parenting style, independent though unsubstantiated complaints of neglect, and the extent of the couple's willingness to work with the social workers assigned to their case.<sup>202</sup>

More often, in jurisdictions with a tight reign on court access, documents do not emerge to provide a balanced account. As Judge Schellhas noted, closure in Minnesota also allowed some parents to manipulate the system.<sup>203</sup> Parents could portray child welfare workers and the court as oppressors.<sup>204</sup> The public received a distorted account of events.<sup>205</sup> "Relatives who never entered the courtroom tended to rally around the parents, not the children who suffered mistreatment."<sup>206</sup>

Schellhas observed a practical side benefit as well. Public access brought family and friends into the courtroom and made them allies of the court.<sup>207</sup> They volunteered to serve as placements for removed children; they kept watch on parents who retained custody.<sup>208</sup> "The more eyes watching and ears listening in a child's life, the greater the chance that a child will be rescued from abuse or neglect."<sup>209</sup>

In the few cases in which there is media interest, court access may turn out to be less intrusive than the alternative. In the case of Katie Beers, the ten-year-old girl who had been imprisoned in a dungeon, the trial judge noted, most reporters concentrated on the courtroom rather than dispersing to the victim's home, neighborhood, and school, "where the disruption of the infant who is involved in these proceedings could occur unfettered by any guideline or limitations."<sup>210</sup> The judge acknowledged a stark reality of news gathering in the modern age. As the visibility and news worthiness of an event increases, so does the demand for information.

At the 2001 federal execution of Timothy McVeigh, for example, an estimated 1400 journalists or members of their support crews descended on the

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201. *Id.*; see also Terry Horne, *Couple Seeks Order for Girl's Return*, INDIANAPOLIS NEWS, June 2, 1994, at A2.

202. See Def.'s Resp. to Verified Mot. for T.R.O., *Newman v. Worcester County Soc. Serv.*, IP94-C-0868 (S.D. Ind. 1994); Terry Horne, *Parenting Styles Clashed, Laura Clem's Rearing Upset Agency's Aides*, INDIANAPOLIS NEWS, June 3, 1994, at A1.

203. Schellhas, *supra* note 6, at 633.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 666.

208. *Id.*

209. *Id.*

210. *In re Katherine B.*, 596 N.Y.S.2d 847, 849 (App. Div. 1993) (quoting Family Court, Suffolk County, trial order of Mar. 5, 1993).

U.S. Penitentiary at Terre Haute, Indiana, where McVeigh was executed.<sup>211</sup> Several hundred also flew to Oklahoma City to record the reactions of family and survivors of the 1995 bombing of the federal building there.<sup>212</sup> The crush of reporters became manageable through pre-arranged plans for the flow of information. Bureau of Prison officials held regular briefings in Terre Haute; Oklahoma City officials allowed television crews to erect tents, scaffolding, and portable studios surrounding the Oklahoma City Memorial, where survivors and family members who wished to talk to the media could gather.<sup>213</sup> Many did.<sup>214</sup>

Validation is the realization that, while retelling of children's stories in open court may be stressful, it may also bring a sense of relief and confirm the seriousness of the injury they have suffered.<sup>215</sup> When proceedings are held behind closed doors, the implication is that victims should be embarrassed about letting people know what has happened to them. Schellhas refers to this as a hidden cruelty.<sup>216</sup>

The notion that publicity can be healing is familiar to journalists. Psychologists coax patients to talk about troubling experiences. Crisis teams debrief first responders to the scenes of airplane crashes and gruesome car accidents.<sup>217</sup> Six years after the Oklahoma City bombing, many survivors and even rescuers still wanted to tell their stories.<sup>218</sup> Others had finished talking and moved on. Some had never talked and never would. The assumption that public attention is invasive and a further trauma is far too simplistic to cover the myriad ways in which people respond and heal. In a case involving a child victim of abuse, the natural impulse of caregivers is to shield and protect. However, as the trial judge in the child protection hearing for Elisa's siblings noted, the major damage has already been done. "Victims of abuse often experience the torment of self-blame. It is one of the saddest consequences of all forms of domestic violence. This sense of guilt arises from within, however, and not from the press."<sup>219</sup>

211. See, e.g., Mary McCarty, *Terre Haute a "Reluctant Participant" of World Focus*, COX NEWS SERVICE, June 9, 2001.

212. Terry Horne, *In Oklahoma City: Strength in Numbers; Memorial Offers Calm Before the Emotional Storm*, INDIANAPOLIS STAR, June 11, 2001, at A1.

213. Author's recollections from various interviews conducted in 2001.

214. *Id.*

215. See, e.g., Schellhas, *supra* note 6, at 667.

216. *Id.*

217. Terry Horne, *Rescuers Often Need Help to Recover from Trauma*, INDIANAPOLIS STAR, May 6, 2001, at A1.

218. Terry Horne, *As the Oklahoma City Bomber Lives out His Final Days, Still-Struggling Survivors Take Some Solace in Knowing . . . "Evil Did Not Triumph,"* INDIANAPOLIS STAR, Apr. 15, 2001, at A1.

219. Committee, *supra* note 6, at 248 (quoting *In re Ruben R.*, unpublished Family Court decision of Dec. 11, 1995).

*C. The Counterview: Still Grounded in Progressive Values*

Opponents of greater public access to juvenile courts have arguments to counter each of the above rationales. Many acknowledge, for example, the role that the public or press can play in bringing greater scrutiny, fairness, and consistency to the juvenile court system.<sup>220</sup> However, they contend that, when balanced against the needs of children who have been brought into court, whether as victims or offender, the value of a public presence pales. Other mechanisms such as appellate review, disciplinary commissions, guardian ad litem, court-appointed child advocates, child protection teams, and citizen panels exist or can be adopted to serve as a check on judicial abuse, insurance of consistency, and a conduit for public awareness.<sup>221</sup>

Those who would keep the doors closed, or at least hard to open, insist that the harm to juveniles from publicity and stigma is real, measurable, and long-lasting. Requiring courtroom testimony can be another form of trauma, and they argue that the harm is accentuated when the testimony must be given in court.<sup>222</sup> In the Katie Beers case, social workers seeking to close the case had submitted an affidavit from the ten-year-old girl, stating in part, "I Don't Want People to Know What HAPPEND to ME, Because It's None of THERE BISINES. A MEAN Little Boy Was Saying Things About ME Last Week and It Made ME Sad."<sup>223</sup> A psychologist, in an affidavit accompanying the statement, declared that the possibility of future disclosure would likely interfere with Katie's therapy.<sup>224</sup> The appellate court, in overturning the decision to open the case, agreed with the psychologist's conclusion that admitting the public and press would "revictimize" Katie.<sup>225</sup>

The Progressive goal of treatment remains the primary concern of advocates of closed courtrooms. Today, treatment generally implies some form of psychological or psychiatric therapy, and in this arena, the need for confidentiality is assumed. "Effective psychotherapy, unlike most conventional medical treatment, requires an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears."<sup>226</sup>

Opponents of the open court movement also argue that the stigma of criminality, mental illness, or mental disability can cause long-lasting, even

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220. See, e.g., Laubenstein, *supra* note 79, at 1907.

221. *Id.*; see also Bazelon, *supra* note 5, at 176-77; William Wesley Patton, *Pandora's Box: Opening Child Protection Cases to the Press and Public*, 27 W. ST. U. L. REV. 181, 199 (1999-2000).

222. Charles R. Petrof, Note, *Protecting the Anonymity of Child Sexual Assault Victims*, 40 WAYNE L. REV. 1677, 1687-88 (1994).

223. *In re Katherine B.*, 596 N.Y.S.2d 847, 850 (App. Div. 1993) (errors in original).

224. *Id.*

225. *Id.* at 853.

226. David R. Katner, *Confidentiality and Juvenile Mental Health Records in Dependency Proceedings*, 12 WM. & MARY BILL OF RTS. J. 511, 528 (2004).

permanent harm to children.<sup>227</sup> As most parents intuitively realize, labeling a child can affect his relationship with his teachers, peers, and other adults in his immediate community, as well as his own self esteem.<sup>228</sup> Publicity, by rewarding some juveniles with attention, may encourage them to act out.<sup>229</sup> News stories can be a permanent record that prevents a juvenile's re-assimilation—even years later and hundreds of miles away, as the story of Gina Grant points out. Harvard University had admitted the straight A-student in early 1995 but then rescinded its offer after learning that she had killed her abusive mother five years earlier.<sup>230</sup> By all accounts, Grant's rehabilitation had been as successful as any rehabilitation could be, and the record of her conviction had been sealed.<sup>231</sup> However, someone anonymously mailed Harvard news clippings about her arrest and subsequent court proceedings.<sup>232</sup>

The stigma does not just attach to the child; it can attach to the family.<sup>233</sup> As one commentator pointed out, disclosure affects poor families more harshly because they lack the resources to get a fresh start by moving to another community, changing schools, or obtaining therapy to offset the harm of publicity.<sup>234</sup>

#### *D. Differing Views About the Role of the Press and How It Works*

Despite these disagreements, both sides of the open court movement are not so far apart as they sometimes seem. Opponents accept that public issues may be so paramount in at least some cases that they require an open door. Advocates are equally concerned about the best interests of children. Most acknowledge the potential for the release of embarrassing information and would allow judicial discretion to close proceedings at certain times or even in some cases.

New York's court rules, for example, allow judges to exclude "some or all observers" if necessary to protect children from harm.<sup>235</sup> Moreover, the rule that courts employ less restrictive alternatives has led most judges to routinely condition access on agreement by the press not to identify the victims.<sup>236</sup> In Minnesota, open access applies only to dependency hearings and even Schellhas, a staunch supporter of access to those proceedings, has reservations about access

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227. Laubenstein, *supra* note 79, at 1904-05; *see also* Katner, *supra* note 226, at 525.

228. Laubenstein, *supra* note 79, at 1904-05.

229. Nelson, *supra* note 111, at 1149-51.

230. Alice Dembner & Jon Auerbach, *Pupil's Past Clouds Her Future; Harvard Rescinds Offer After Learning That Honors Student Killed Her Mother*, BOSTON GLOBE, Apr. 7, 1995, at Metro/Region 1.

231. *Id.*

232. *Id.*; *see also* Hollister, *supra* note 122, at 913-17.

233. Katner, *supra* note 226, at 527.

234. *Id.*

235. N.Y. Comp. Codes R. & Regs, tit. 22, § 205.4(b)(3).

236. Committee, *supra* note 6, at 259.

to delinquency hearings.<sup>237</sup> In Michigan, where juvenile court proceedings have been open for nearly two decades, court rules effectively require the maintenance of two record systems. One is the public file containing allegations, subpoenas, and other routine information; the other is the closed “social file” holding mental health records, school files, and other evaluations.<sup>238</sup> Even in Oregon, where the state’s supreme court held that the state constitution required all court proceedings to be open, the court’s opinion left unresolved the question whether access could be limited if required to assure a fair trial and whether certain individuals could be excluded.<sup>239</sup>

The fundamental disagreement is generally about whether states should adopt a rebuttable presumption that proceedings are closed or open. Underlying this disagreement, however, are competing views about the nature of the media and its relationship to the judicial system.

Those who would keep juvenile courts mostly closed often see the media in a static role that, while varied, is academic and bureaucratic. The specifics may differ. However, the general notion likely parallels this description by the Illinois Supreme Court that a newspaper’s constitutional role is to “act[] as a conduit for the public in generating the free flow of ideas, keep[] the public informed of the workings of governmental affairs, and check[] abuses by public officials.”<sup>240</sup>

Few journalists would disagree that their role includes at least this much,<sup>241</sup> but it seems a dry formulation of the job that reporters often do. Interviewing the mother of a five-year-old child who has just been shot dead by the neighborhood drunk seems, at first glance, to have little to do with the free flow of ideas, the workings of governmental affairs, and checking abuses by public officials.<sup>242</sup> Nor do details that the mother had just bought her son his clothes for his first day of school. Or that the drunk had been pounding on the door, trying to collect a five dollar debt, when he fired his gun and killed the boy on the other side. These are the very sort of details that resonate with readers and, on occasion, propel them to act. Yet their importance is minimized in the conduit model.

This view of the media as merely informer and watchdog has led to suggestions that public access to juvenile courts can be satisfied by various alternatives, such as participation in media panels<sup>243</sup> or contractual agreements to

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237. Schellhas Telephone Interview, *supra* note 155.

238. Mich. Ct. R. 3.925 (2006); *see also* Kresnak, *supra* note 166.

239. State *ex rel.* Oregonian Publ’g Co. v. Deiz, 613 P.2d 23, 27 (Ore. 1980).

240. *In re Minor*, 595 N.E.2d 1052, 1057 (Ill. 1992).

241. See, for example, this excerpt from the Society of Professional Journalists’ mission statement: “To ensure that the concept of self-government . . . remains a reality . . . , the American people must be well informed . . . . It is the role of journalists to provide this information in an accurate, comprehensive, timely and understandable manner.” Society of Professional Journalists, SPJ Missions, [http://www.spj.org/spj\\_missions.asp](http://www.spj.org/spj_missions.asp) (last visited Jan. 26, 2006).

242. Author’s recollections from researching a news story in the early 1980s while working as a reporter for the *Birmingham Post Herald*.

243. See, e.g., Patton, *supra* note 221, at 199-204.

inspect juvenile files without releasing identifying details.<sup>244</sup> Subscribers to the conduit model encourage reporters to educate and reform.<sup>245</sup> One scholar instructs, "Reform should not come about because '[t]he bright lights of the media shine on a dead child's battered body, and for a short time the system kicks into high gear.'"<sup>246</sup>

Moreover, when courtrooms are opened and reporters fail to appear on a regular basis, as indeed happened in Minnesota,<sup>247</sup> conduit adherents suggest that the press is not fulfilling its end of the bargain. As one noted open-court critic, Professor William Wesley Patton, remarked, "The press' claims that they want to enter the child abuse system to educate the public regarding systemic abuse and inefficiency has proven to be nothing more than a hollow platitude."<sup>248</sup>

When the media's role is so narrowly defined, then the press is likely to come up short when the value of its general functions are balanced against the potential but specific harm to a sympathetic child victim who has already been traumatized. This is particularly true, Professor Patton suggests, if the media's interest is merely in cases involving celebrities or particularly gruesome abuse.<sup>249</sup> "Thus we would be left with this paradox: the press would not be admitted to the hearings they most want to report on and they would not report on the hearings in which they would be entitled to attend."<sup>250</sup>

This has not happened. In states such as Minnesota, Michigan, and New York, open door policies have brought reporters into the courtrooms even if the frequency is sometimes not as high as reformers had hoped.<sup>251</sup> What many judges realized was that although the media's attention is episodic, even fitful, some coverage is better than none. As Judge Payne noted, "It brings attention to the system."<sup>252</sup> Moreover, some cases resonated with the public in a way that others, even those that were as gruesome or more so, did not.<sup>253</sup> For Judge Sara Schechter overseeing the Elisa sibling child protection hearing, it was "the underlying tragedy, and the ensuing public debate (which) provided an appropriate opportunity to educate the public."<sup>254</sup>

What these judges understood is that courtrooms are a public forum where interests, norms, and social values conflict. Cases did not capture the public's

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244. See, e.g., Shannon F. McLatchey, *Media Access to Juvenile Records: In Search of a Solution*, 16 GA. ST. U. L. REV. 337, 356-58 (1999).

245. Jennifer L. Rosato, *The Future of Access to the Family Court: Beyond Naming and Blaming*, 9 J.L. & POL'Y 149, 158 (2000).

246. *Id.* (quoting Jerry Harris, *Postmortem: After Elisa. CWA Shifts Gears Following Another Abused Child's Death*, VILLAGE VOICE, Dec. 12, 1995, at 14).

247. See Walsh, *Child-Protection Hearings to Open to Public Today*, *supra* note 171.

248. Patton, *supra* note 221, at 193.

249. *Id.* at 193-95.

250. *Id.* at 194.

251. See, e.g., Committee, *supra* note 6, at 259-61.

252. Payne Telephone Interview, *supra* note 159.

253. *Id.*

254. *In re Ruben R.*, 641 N.Y.S.2d 621, 624 (App. Div. 1996).

attention. Stories did. And they captured the public’s eye usually because they symbolized fundamental conflicts or concerns that the public cared about. As Judge Schellhas notes, “What happens in the courtroom generates discussion, and exchanges, and discourse about norms and policies and values.”<sup>255</sup>

### *E. Public Discourse and the Importance of Storytelling*

The open court movement—the realization of judges that the juvenile justice system was stagnating from secrecy—is an affirmation of a concept that some sociologists, cultural historians, and anthropologists refer to as the “public sphere,”<sup>256</sup> that law Professor Judith Resnik terms the “public dimension,”<sup>257</sup> and this Note labels the “public discourse.” It is a concept that tries to capture the shifting interplay of events, culture, and politics; of water-cooler conversations and the six o’clock news; of court room trials, street protests, and sporting events.<sup>258</sup>

In this shifting collage of values, norms, and ideas, the news media is not entirely rudderless. For a quarter-century, a group of teachers at the University of Missouri School of Journalism have offered their students a list of six news values that American journalists tend to consider in evaluating the newsworthiness of an event.<sup>259</sup> The factors are proximity, impact, timeliness, prominence, uniqueness (now labeled novelty), and conflict.<sup>260</sup> A local murder, for example, is more newsworthy than a murder abroad. A car accident involving the mayor gets better play than a car accident involving an ordinary citizen.

The most common of these values may be conflict, an element that is present in most news stories in some fashion. It is also the element that is ever present in courtrooms. Courts are public places where conflicts between people, values, and interests are resolved. In this sense, the happenings in a courtroom are almost always news to some extent. Whether that news becomes part of the public discourse will depend on the degree of that conflict and the presence of other news values.

It will also depend, however, on narrative power. As Professor Resnik notes, “[trials] have the capacity to generate emotion.”<sup>261</sup> News stories from the courtroom resonate because of story lines that touch upon common values, ideas, or concerns. The story of Gina Grant’s rescinded admission to Harvard, for example, had narrative power because of multiple story lines: the ability of

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255. Schellhas Telephone Interview, *supra* note 155.

256. See, e.g., JURGEN HABERMAS, JURGEN HABERMAS ON SOCIETY AND POLITICS, A READER 231-36 (Steven Seidman ed. 1989).

257. See Resnik, *supra* note 9, at 407.

258. Some have suggested that modern political democracy began with the development of the public sphere in the eighteenth century. See HABERMAS, *supra* note 256, at 232-36.

259. THE MISSOURI GROUP—BRIAN BROOKS, GEORGE KENNEDY, DARYL MOEN & DON RANLY, NEWS REPORTING AND WRITING 5-6 (8th ed., Bedford/St. Martins 2005).

260. *Id.*

261. Resnik, *supra* note 9, at 413.

society to forgive and for what crimes, the rights of potential classmates to information about a woman's past, the consideration of character as a basis for admission to a prestigious university, the right to erase one's past, and more.

Journalists learn quickly the power of narrative. Reporters are trained "to show, not tell." Even stories written in the traditional inverted pyramid style, so-called because the facts are given in order of importance, often contain mini-narratives. Stories may be organized around "actors," each of whom contributes an idea that helps move the story along.<sup>262</sup> Stories resonate when they evoke images, emotions, or memories in readers. They do this through detail, not generalities. As the Seventh Circuit recognized, "Reporting the true facts about real people is necessary to 'obviate any impression that the problems . . . are remote or hypothetical.'"<sup>263</sup>

Reporter Jack Kresnak, who has been covering juvenile issues for the *Detroit Free Press* since 1988, has written about hundreds of children in the juvenile court system.<sup>264</sup> He says he cannot remember a single one who was harmed by the publicity.<sup>265</sup> "The vast majority of them are helped by the little attention paid to their case. They don't get lost in the system."<sup>266</sup> Yet Kresnak had long held the hope of writing a story or stories that set out how the juvenile system really worked.<sup>267</sup> That was, he acknowledged, a dry topic. So his solution was "a narrative series, with cliff hangers and stuff."<sup>268</sup>

The series, which ran the week of December 4, 2000, began this way:

The emergency room doctor had never seen a body so badly beaten.

The victim, already dead when she was carried into Port Huron Hospital on Jan. 31, weighed just 26 pounds.

Her skull was cracked. Her right elbow was broken. Bruises, fresh and old, covered her arms, legs, feet, back, chest and head.

Her name was Ariana Swinson. She was 2 years old.<sup>269</sup>

The narrative series connected with readers with a force that other stories lacked.<sup>270</sup> On January 3, 2005, more than four years later, Kresnak watched as

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262. See, e.g., WILLIAM E. BLUNDELL, *THE ART AND CRAFT OF FEATURE WRITING: BASED ON THE WALL STREET JOURNAL GUIDE* 20, 110 (1988).

263. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1233 (7th Cir. 1993) (quoting *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981)).

264. Telephone Interview with Jack Kresnak, Reporter, *Detroit Free Press* (Oct. 2003).

265. *Id.*

266. *Id.*

267. Telephone Interview with Jack Kresnak, Reporter, *Detroit Free Press* (Feb. 4, 2005) [hereinafter 2005 Kresnak Telephone Interview].

268. *Id.*

269. Jack Kresnak, *Murder by Neglect: Ariana's Story, A 2-Year-Old Girl Dies at Her Parents' Hands After the System Meant to Protect Her Fails*, *DETROIT FREE PRESS*, Dec. 4, 2000, at A1.

270. 2005 Kresnak Telephone Interview, *supra* note 267.

Governor Jennifer Granholm signed “Ariana’s Law.”<sup>271</sup> The act gave the state’s Children’s Ombudsman Office access to child welfare reports and records, which had remained secret even after the juvenile courts had opened most of their own records and proceedings.<sup>272</sup>

Courtrooms, like newspapers or television, employ narrative power. As Professor Resnik has observed, stories are told at trial.<sup>273</sup> “As the success of soap operas suggests, the unfolding of a story in bits and pieces can capture our interest and perhaps can even provide a sense of vicarious participation.”<sup>274</sup> Courtroom stories often have more power because they are told in a forum with rules and procedure that, rightly or not, imbue these narratives with credibility. Legal cases have become a staple of national broadcast news, not because these stories are easy to obtain, but because such stories are “shared tales”<sup>275</sup> told in a familiar forum.<sup>276</sup> As open courts advocates realized, stories that “strike a chord tend to be the cases that spur legislative action.”<sup>277</sup> When high-profile narratives such as the stories of Katie Beers, Elisa Izquierdo, and Ariana Swinson capture the nation’s attention, it makes little sense to deny the public admission to the most credible forum.

### CONCLUSION

Opening juvenile courts is not a solution to the recurring problems this country has faced in trying to address the needs of children. As former Minnesota Chief Justice Kathleen Blatz noted, change is likely to be measured in decades.<sup>278</sup> “Opening up juvenile court is a conduit for change. It’s not substantive change. It’s a window.”<sup>279</sup> Yet the juvenile court experience has immediate significance for the analysis of court access issues.

First, courts are public places where society’s values, ideas, and concerns are continually tested. When access to the courts, or their records, is denied, then society loses the value of those decisions. Social policies and institutions can stagnate.

Second, public presence is not merely a conduit for the flow of information

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271. *Id.*; see Gov. Granholm Signs Ariana’s Law to Protect Children in Michigan, US FED NEWS, Jan. 3, 2005.

272. *Id.*; see also 2004 Mich. Pub. Acts 560 (codified as amended at Mich. Comp. Laws §§ 722, 922-930 (2005)).

273. Resnik, *supra* note 9, at 413.

274. *Id.*

275. *Id.*

276. Schellhas Telephone Interview, *supra* note 155.

277. Sokol, *supra* note 27, at 920.

278. Telephone Interview with Kathleen Blatz, Chief Justice, Minnesota Supreme Court (Oct. 2003) [hereinafter Blatz Telephone Interview]. Blatz retired from the bench on Jan. 10, 2006. See David Phelps & Janet Moore, *Inside Track, Blatz Goes Back to School*, STAR TRIBUNE (Minneapolis), Jan. 16, 2006, at D1.

279. Blatz Telephone Interview, *supra* note 278.

or means of ensuring scrutiny of government actors. Rather, the public's presence, usually through the media, is a means of participating in the public discourse.

Third, court proceedings have an impact on the public discourse not simply because conflicts are resolved, but because those conflicts are resolved in a structured setting for storytelling.

As new court access issues emerge, such as access to electronic court records, or as courts reexamine the need for access to existing proceedings, the participants in these debates should remember that the consequences are not limited to the judicial system alone. The stories that are told, or not told, will affect who we are as individuals, as a community, and a society. They will help determine our capacity for change, our ability to learn, and our growth as a people. The importance of public discourse is not new. As James Madison remarked more than 200 years ago, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or, perhaps both."<sup>280</sup>

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280. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 518 (1984) (Stevens, J., concurring) (quoting 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed., 1910)).

# HAVING LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLANS TAKE INTO ACCOUNT THE QUALITY OF SCHOOLS AT PROPOSED FAMILY HOUSING SITES: A PARTIAL ANSWER TO THE RESIDENTIAL SEGREGATION DILEMMA?

SEEMA RAMESH SHAH\*

## INTRODUCTION

Is it possible that the largest federal subsidy program in the nation is being administered in such a way as to perpetuate racial and ethnic segregation in urban and suburban America? State housing agencies that administer the Low Income Housing Tax Credit (“LIHTC”) program, the largest federal subsidy program for constructing and rehabilitating affordable housing, are currently under attack for promoting such segregation.<sup>1</sup> Recently, in New Jersey, public interest organizations brought to light the reality that the allocation of tax credits for low-income housing is promoting segregation.<sup>2</sup> The public interest groups asserted that the state agency is bound by the “affirmatively to further” requirement under the Federal Fair Housing Act, which has a dual purpose—to prevent discrimination *and* to promote integration.<sup>3</sup> Armed with statistics highlighting the impact of the state agency’s subsidized housing plan on segregation, the groups were rightfully concerned that the second obligation was far from being met.<sup>4</sup> It was a case of first impression; no court had declared that the Fair Housing Act “affirmatively to further” duty should be imposed upon a state housing credit agency. The court declared that the state agency *was* bound by that duty and that all of its housing development activities, including the construction of its Qualified Allocation Plan (“QAP”)—the means by which the state agency decides to award tax credits—also were subject to the obligation.<sup>5</sup>

A victory for the public interest groups? Unfortunately, no. The public interest groups also had demanded that the state agency take race into account when determining to which development sites to award tax credits, which would allow the state agency to fulfill its mandate to promote integration.<sup>6</sup> The court stated that the state agency did not have to take race into account in order to promote integration. In fact, the court declared that the state agency was doing

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1. *See infra* note 8 and accompanying text.

2. *In re* Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re* 2003 QAP), 848 A.2d 1 (N.J. Super. Ct. App. Div.), *cert. denied*, 861 A.2d 846 (N.J. 2004).

3. *Id.* at 12; *see also* 42 U.S.C. § 3601-3631 (2000).

4. *In re* 2003 QAP, 848 A.2d at 5.

5. *Id.* at 11.

6. *Id.* at 15.

all that it could to promote integration in light of its other statutory duties and that utilizing racial classifications within the QAP would only subject the state agency to possible court challenges.<sup>7</sup>

The court's decision frustrates desegregation activists and leaves many unanswered questions. Did the court render the "affirmatively to further" duty effectively futile? Does the court's decision declare that the duty to promote integration is subordinate to the other statutory obligations of the state agency? How can racial classifications be utilized in QAPs without being invalidated? If the state agency is hesitant to make a racial classification within its QAP due to possible court challenges, is there any other kind of classification which can shield a state agency from such challenges and yet effectively achieve integration?

Part I of this Note describes the LIHTC program as a whole and the role of QAPs within the program. Part II focuses on the impact of the Federal Fair Housing Act on QAPs. Part III addresses the issue of race-based classifications within QAPs, focusing on proper construction of race-based classifications and possible challenges to race-based classifications. Finally, Part IV proposes that because there is a correlation between the quality of schools and racial segregation in neighborhoods, state agencies should take into account the quality of schools when developing their QAPs in order to effectively promote integration.

#### I. QUALIFIED ALLOCATION PLANS WITHIN THE LOW INCOME HOUSING TAX CREDIT PROGRAM

Created by the 1986 Tax Reform Act and administered by the Department of the Treasury ("Treasury"), the LIHTC program is the largest federal subsidy program for affordable housing production and rehabilitation.<sup>8</sup> In fact, "[t]he LIHTC program produced more than a million units between 1987 and 2001 and has added about 90,000 units in each succeeding year, resulting in a probable total of 1.3 million."<sup>9</sup> The LIHTC program achieves this not by granting direct

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7. *Id.*

8. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189-208 (codified as amended at 26 U.S.C. § 42 (2000)); see also Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1011-12 (1998) ("With the withdrawal of federal support for most other subsidized housing development programs, the LIHTC program stands as essentially 'the only game in town.'").

9. Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 HOW. L.J. 913, 927 (2005); see also Ted M. Handel & David C. Nahas, *Leveraging the Low-Income Housing Tax Credit Program*, 26 L.A. LAW. 23, 23 (2004) ("Seventeen years after it was enacted into law . . . the program is generating \$6 billion in housing investments and creating more than 115,000 affordable rental housing units nationwide each year for low-income families, seniors, the homeless, and persons with special needs.").

subsidies for construction or rehabilitation of low income housing but by granting tax credits to investors involved in the production or rehabilitation of affordable housing; thus, the investors benefit from a direct reduction in their taxes.<sup>10</sup>

In order to be eligible for tax credits, individual projects must either set aside twenty percent or more of the housing units to renters with incomes of fifty percent or less of the area's median gross income *or* set aside forty percent or more of the housing units to renters with incomes no greater than sixty percent of the area's median gross income.<sup>11</sup> Additionally, the housing development must remain affordable to low-income renters for a period of at least thirty years.<sup>12</sup>

The Internal Revenue Service ("IRS") is responsible for allocating tax credits to individual states according to their populations.<sup>13</sup> Because the applications for individual housing projects exceed the number of tax credits, there is much competition to obtain available tax credits.<sup>14</sup> Although the tax credits are generated at the federal level, there is significant state involvement with the program;<sup>15</sup> thus, it is critical to examine the LIHTC program on both the federal and state levels.

State housing finance agencies carry out the LIHTC program by allocating

10. See U.S. Dep't of Hous. & Urban Dev., *How Do Housing Tax Credits Work?*, <http://www.hud.gov/offices/cpd/affordablehousing/training/web/lihtc/basics/work.cfm> (last visited May 18, 2006) ("Federal housing tax credits are awarded to developers of qualified projects. Developers then sell these credits to investors to raise capital . . . for their projects, which reduces the debt that the developer would otherwise have to borrow."); Robert Neuwirth, *Renovation or Ruin: Is the LIHTC Program Promoting Segregation?*, SHELTERFORCE ONLINE ¶ 21 (Sept./Oct. 2004), <http://www.nhi.org/online/issues/137/LIHTC.html> (last visited May 18, 2006) ("The government earmarks approximately \$3 billion to low-income housing tax credits every year . . . ."); see also Roisman, *supra* note 8, at 1014-15 ("The investors' incentive is the expectation that for ten years they will receive tax credits and other tax benefits, such as business loss deductions, that they can use to offset the taxes they owe on other income." (internal quotation marks omitted) (citing U.S. GEN. ACCOUNTING OFFICE, TAX CREDITS: OPPORTUNITIES TO IMPROVE OVERSIGHT OF THE LOW-INCOME HOUSING PROGRAM 27-28 (1997))).

11. 26 U.S.C. § 42(g)(1) (2000); see also Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 217 (2003).

12. 26 U.S.C. § 42(h)(6)(D); *id.* § 42(i)(1); see also Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1777 (2005).

13. 26 U.S.C. § 42(h)(3)(C); see also Neuwirth, *supra* note 10, ¶ 22.

14. Ballard, *supra* note 11, at 212-13; see also U.S. Dep't of Hous. & Urban Dev., *Allocating Housing Tax Credits*, <http://www.hud.gov/offices/cpd/affordablehousing/training/web/lihtc/basics/allocating.cfm> (last visited May 18, 2006).

15. U.S. Dep't of Hous. & Urban Dev., *supra* note 14 ("[T]he IRS allocates housing tax credits to designated state agencies—typically state housing finance agencies—which in turn award the credits to developers of qualified projects.").

these tax credits to individual projects in accordance with Qualified Allocation Plans, which each agency must develop and adopt.<sup>16</sup> “A QAP is the means by which a state housing credit agency administers the . . . program . . . .”<sup>17</sup> Thus, the criteria within QAPs determine whether or not an individual project will be funded.

Congress has set forth certain criteria and preferences which agencies must include within their QAPs. A QAP refers to any plan:

- (i) which sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions,
- (ii) which also gives preference in allocating housing credit dollar amounts among selected projects to—
  - (I) projects serving the lowest income tenants,
  - (II) projects obligated to serve qualified tenants for the longest periods, and
  - (III) projects which are located in qualified census tracts<sup>18</sup> (as defined in subsection (d)(5)(C)) and the development of which contributes to a concerted community revitalization plan, and
- (iii) which provides a procedure that the agency (or an agent or other private contractor of such agency) will follow in monitoring for noncompliance with the provisions of this section and in notifying the Internal Revenue Service of such noncompliance which such agency becomes aware of and in monitoring for noncompliance with habitability standards through regular site visits.
- (C) Certain selection criteria must be used.—The selection criteria set forth in a qualified allocation plan must include—
  - (i) project location,
  - (ii) housing needs characteristics,
  - (iii) project characteristics, including whether the project includes the use of existing housing as part of a community revitalization plan,
  - (iv) sponsor characteristics,
  - (v) tenant populations with special housing needs,

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16. 26 U.S.C. § 42(m)(1)(A)(i); *see also* Roisman, *supra* note 8, at 1012; Neuwirth, *supra* note 10, ¶ 22.

17. *In re* Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re* 2003 QAP), 848 A.2d 1, 5 (N.J. Super. Ct. App. Div.), *cert. denied*, 861 A.2d 846 (N.J. 2004); *see also* JEREMY GUSTAFSON & J. CHRISTOPHER WALKER, THE URBAN INSTITUTE, ANALYSIS OF STATE QUALIFIED ALLOCATION PLANS FOR THE LOW-INCOME HOUSING TAX CREDIT PROGRAM (2002), *available at* <http://www.huduser.org/publications/pdf/AnalysisQAP.pdf>.

18. “The term ‘qualified census tract’ means any census tract which is designated by the Secretary of Housing and Urban Development and . . . either in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income.” 26 U.S.C. § 42(d)(5)(C)(ii)(I).

- (vi) public housing waiting lists,
- (vii) tenant populations of individuals with children, and
- (viii) projects intended for eventual tenant ownership.<sup>19</sup>

Although Congress has provided some criteria to state and local finance agencies as how to develop QAPs, the criteria set forth are neither specific nor defined.<sup>20</sup> Thus, because the statutory criteria are vague, QAPs can differ greatly from state to state. The state and local finance agencies have considerable leeway when developing their QAPs, thereby giving the agencies considerable leeway in determining how to allocate the distribution of tax credits. Basically, state and local finance agencies can determine for which project characteristics they will award more “points” and for which project characteristics they award fewer “points.” Naturally, proposed project developments with more points have a greater chance of being funded than a proposed plan that is awarded fewer points. Thus, state and local finance agencies make clear what they consider the most important development priorities, what they consider the least important development priorities, and what is not a development priority at all.

## II. THE IMPACT OF TITLE VIII ON QAPS

Although state agencies do have great flexibility in constructing their individual QAPs, each agency should be aware that the LIHTC program must operate with “regard to civil rights laws.”<sup>21</sup> “The fundamental source of civil rights obligations imposed on the . . . administration of the LIHTC program is Title VIII of the 1968 Civil Rights Act.”<sup>22</sup>

Title VIII makes it unlawful, among many other things, “to refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”<sup>23</sup> Furthermore, according to Title VIII, the Secretary of Housing and Urban Development (“HUD”) is required to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this

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19. *Id.* § 42(m)(1)(B) and (C) (bold omitted).

20. U.S. GEN. ACCOUNTING OFFICE, TAX CREDITS: OPPORTUNITIES TO IMPROVE OVERSIGHT OF THE LOW-INCOME HOUSING PROGRAM 2 (1997); see Roisman, *supra* note 8, at 1018. Professor Roisman explains that “while the Code specifically directs the agencies to include seven ‘selection criteria’ in their allocation plans[,] the Code does not define these criteria or provide any guidance for their use.” *Id.* (brackets in original) (internal quotation marks omitted) (citing U.S. GEN. ACCOUNTING OFFICE, *supra*). Professor Roisman further explains, “For example, the Code requires that each QAP’s selection criteria include ‘project location’ and ‘tenant populations with special housing needs,’ but does not tell an allocating agency what to do about these subjects.” *Id.* (internal citation omitted).

21. Roisman, *supra* note 8, at 1012.

22. *Id.* at 1025.

23. 42 U.S.C. § 3604(a) (2000).

subchapter.”<sup>24</sup> Additionally, Title VIII mandates as follows:

[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.<sup>25</sup>

Title VIII plainly states that all federal agencies involved in housing are subject to the statute. “The statute imposes on the Treasury the obligation to administer the LIHTC program ‘in a manner affirmatively to further the purposes of’ Title VIII.”<sup>26</sup> Thus, it is important to examine (1) what exactly is meant by “affirmatively to further” and (2) whether the obligations imposed on the Treasury are passed on to state and local finance agencies allocating the LIHTC program tax credits.

The purposes of Title VIII are twofold—to prohibit discrimination and to promote integration.<sup>27</sup> The legislative history of Title VIII demonstrates that proponents of enacting Title VIII not only wanted to end discrimination but also to promote residential integration. “Proponents of Title VIII in both the Senate and House repeatedly argued that the new law was intended not only to expand housing choices for individual blacks, but also to foster racial integration for the benefit of all Americans.”<sup>28</sup> There is no question that integration was a prime consideration when enacting Title VIII. “Aware . . . that the nation was dividing into two racially separate societies, Congress *clearly* intended Title VIII to remedy segregated housing patterns and the problems associated with them—segregated schools, lost suburban job opportunities for minorities, and the alienation of whites and blacks . . . .”<sup>29</sup>

Furthermore, caselaw addressing the nature of Title VIII relied heavily on the legislative history to determine that the purpose of the statute was twofold.<sup>30</sup>

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24. 42 U.S.C. § 3608(e)(5).

25. *Id.* § 3608(d).

26. Roisman, *supra* note 8, at 1025.

27. *Id.* at 1026-29 (discussing in depth the purposes of Title VIII as explained through the caselaw).

28. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 2.3, at 2-6 to 2-7 (West 2001) [hereinafter SCHWEMM, HOUSING DISCRIMINATION]. “Senator Mondale, the FHA’s principal sponsor, decried the prospect that ‘we are going to live separately in white ghettos and Negro ghettos.’” Robert G. Schwemm, *Discrimination Housing Statements and § 3604(C): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 212 (2001). Furthermore, “Congressman Cellar, the Chairman of the House Judiciary Committee, spoke of the need to eliminate the ‘blight of segregated housing and the pale of the ghetto . . . .’” *Id.* (citing 114 CONG. REC. 9559 (1968)).

29. SCHWEMM, HOUSING DISCRIMINATION, *supra* note 28, at 2-6 to 2-7 (emphasis added).

30. See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting Senator Mondale in his assertion that “the reach of the proposed law was to replace the ghettos with ‘truly

Specifically, in *Shannon v. HUD*,<sup>31</sup> residents and organizations challenged a decision by HUD to finance a low-income housing project. The residents and organizations claimed that the housing development would exacerbate the high concentration of low-income black residents in the area. They further alleged that this would adversely affect the quality of life and property values in the neighborhood.<sup>32</sup> The Third Circuit noted that one of the goals of Title VIII was to prevent racial and economic concentration which could lead ultimately to urban blight.<sup>33</sup> The court held that HUD was prohibited from making funding decisions without “some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the . . . 1968 Civil Rights Act[.]”<sup>34</sup> Thus, before making any funding decisions, HUD was required to carefully analyze the racial and economic effect a proposed housing development would have on a neighborhood.<sup>35</sup> The court further suggested the following criteria that could appropriately be included in the “institutionalized method” required by Title VIII:

1. What procedures were used by the LPA [local public agency] in considering the effects on racial concentration when it made a choice of site or of type of housing?
2. What tenant selection methods will be employed with respect to the proposed project?
3. How has the LPA or the local governing body historically reacted to proposals for low income housing outside areas of racial concentration?
4. Where is low income housing, both public and publicly assisted, now located in the geographic area of the LPA?
5. Where is middle income and luxury housing, in particular middle income and luxury housing with federal mortgage insurance guarantees,

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integrated and balancing living patterns” (citing 114 CONG. REC. 2706)); *id.* at 209 (referring to the “broad and inclusive” language of Title VIII); *see also* *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 933 (2d Cir. 1988), *aff’d in part*, 488 U.S. 15 (1988) (per curiam) (stating that Title VIII should be broadly interpreted in order to fulfill the “congressional mandate” of promoting integration); *NAACP, Boston Chapter v. HUD*, 817 F.2d 149, 155 (1st Cir. 1987) (stating that “every court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating”); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134-35 (2d Cir. 1973) (referring to the fact that “Congress’ desire in providing fair housing throughout the United States was to stem the spread of urban ghettos and to promote open, integrated housing”). *See generally* Roisman, *supra* note 8, at 1026 (noting that the caselaw demonstrates the dual purpose nature of Title VII: “to eschew discrimination and to promote integration”).

31. 436 F.2d 809, 811 (3d Cir. 1970).  
32. *Id.* at 818.  
33. *Id.*  
34. *Id.* at 821.  
35. *Id.*

located in the geographic area of the LPA?

6. Are some low income housing projects in the geographic area of the LPA occupied primarily by tenants of one race, and if so, where are they located?

7. What is the projected racial composition of tenants of the proposed project?

8. Will the project house school age children and if so what schools will they attend and what is the racial balance in those schools?

9. Have the zoning and other land use regulations of the local governing body in the geographic area of the LPA had the effect of confining low income housing to certain areas, and if so how has this effected racial concentration?

10. Are there alternative available sites?

11. At the site selected by the LPA how severe is the need for restoration, and are other alternative means of restoration available which would have preferable effects on racial concentration in that area?<sup>36</sup>

The court further explained that "the agency's judgment must be an informed one; one which weighs the alternatives and finds that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration."<sup>37</sup> Thus, an informed decision promoting racial integration must be a priority when determining site selection for low-income housing developments.

Although *Shannon* and most other cases involved HUD, Title VIII does

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36. *Id.* at 821-22.

37. *Id.* at 822. Other cases also have addressed the importance of racial integration and informed decision-making on the agency's part. For example, in *Otero v. New York City Housing Authority*, 484 F.2d 122 (2d Cir. 1993), the Second Circuit stated

[t]o allow housing officials to make decisions having the long range effect of increasing or maintaining racially segregated housing patterns merely because minority groups will gain an immediate benefit would render such persons willing, and perhaps unwitting, partners in the trend toward ghettoization of our urban centers.

There may be some instances in which a housing decision will permissibly result in greater racial concentration because of the overriding importance of other imperative factors in furtherance of national housing goals. But Congress' desire in providing fair housing throughout the United States was to stem the spread of urban ghettos and to promote open, integrated housing, even though the effect in some instances might be to prevent some members of a racial minority from residing in publicly assisted housing in a particular location. The affirmative duty to consider the impact of publicly assisted housing programs on racial concentration and to act affirmatively to promote the policy of fair, integrated housing is not to be put aside whenever racial minorities are willing to accept segregated housing.

*Id.* at 1134.

impose the same obligation of utilizing an informed decision-making process to promote integrated living patterns on the Treasury as well. Thus, the Treasury is not limited to prohibiting discrimination within its practices and must also focus on integration. “[W]e are satisfied that the affirmative duty placed on . . . HUD . . . and through [it] on other agencies administering federally-assisted housing programs also requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area . . . .”<sup>38</sup> Furthermore, the Executive Branch of the federal government also instructs executive agencies that are involved in the development of housing to act to end discriminatory policies and practices that “result in segregated patterns of housing and necessarily produce other forms of discrimination and segregation.”<sup>39</sup> Because of the plain language of Title VIII, the caselaw, and executive orders, the Treasury must affirmatively further fair housing by promoting integrated living patterns through an informed decisionmaking process.<sup>40</sup>

Although the duty affirmatively to further fair housing is imposed on the Treasury, the question remains whether this duty is passed on to local and state finance agencies that allocate LIHTC tax credits pursuant to their individual QAPs. If the duty affirmatively to further fair housing is passed on to state and local finance agencies, then the agencies cannot lawfully construct their QAPs in a manner that will frustrate the goals of Title VIII. Specifically, the state and local finance agencies must not only prohibit discriminatory practices within their QAPs, but also must promote integration through their QAPs.

There exists a strong argument that a specific Department of Treasury regulation imposes upon state housing agencies the duty affirmatively to further fair housing. The regulation provides in relevant part as follows:

If a residential rental unit in a building is not for use by the general public, the unit is not eligible for a section 42 credit. A residential rental unit is for use by the general public if the unit is rented in a manner consistent with housing policy governing non-discrimination, as

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38. *Otero*, 484 F.2d at 1133-34; *see also* Roisman, *supra* note 8, at 1045 (“To the extent that § 3608(e) requires that HUD take racial and socio-economic data into account, the substantially identical language of § 3608(d) requires that the Treasury provide that racial and socio-economic concentration be taken into account.”).

39. Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963), *reprinted as amended* in 42 U.S.C. § 3608 (1988); Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 8513, 8513 (1994) (“If all of our executive agencies affirmatively further fair housing in the design of their policies and administration of their programs relating to housing and urban development, a truly nondiscriminatory housing market will be closer to achievement.”).

40. *See* Roisman, *supra* note 8, at 1031, for a discussion of the Treasury’s obligations under Title VIII.

evidenced by rules or regulations of the Department of Housing and Urban Development (HUD) (24 CFR subtitle A and chapters I through XX).<sup>41</sup>

Although this provision explaining eligibility for tax credits does not explicitly refer to the location of possible housing developments and rather refers to individual tenant unit rental, the provision does require the state or local housing agency to comply with “24 CFR subtitle A and chapters I through XX,” which are regulations that include HUD’s site selection regulation.<sup>42</sup> Title 24 C.F.R. § 941.202 provides in relevant part as follows:

Proposed sites for public housing projects to be newly constructed or rehabilitated must be approved by the field office as meeting the following standards:<sup>43</sup>

- ...  
(b) The site and neighborhood must be suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of ... Title VIII of the Civil Rights Act of 1968 ...<sup>44</sup>

Thus, a state or local housing agency is required to affirmatively further fair housing, including through its construction of QAPs. This duty is initially imposed on the Treasury through Title VIII, caselaw interpreting the goals of Title VIII, and Executive Order 11,063. The Treasury then arguably imposes this obligation on state and local finance agencies allocating LIHTC credits through 26 C.F.R. § 1.42-9(a), incorporating HUD’s site selection regulation 24 C.F.R. § 941.202.<sup>45</sup>

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41. 26 C.F.R. § 1.42-9(a) (2006).

42. Appellants’ Brief on Appeal at 37-39, *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003 QAP)*, 848 A.2d 1 (N.J. Super. Ct. App. Div.) (No. A-10-02T2), *cert. denied*, 861 A.2d (N.J. 2004) [hereinafter Appellants’ Brief on Appeal]. Although *In re 2003 QAP*—the first case to confront the issue of whether state and local housing agencies must affirmatively further fair housing—decided that the terms of this regulation only apply to the rental of units and do not apply to the criteria used by a state or local finance agency to allocate tax credits, the court ultimately did decide, on other grounds, that state and local housing agencies must affirmatively further fair housing pursuant to Title VIII. *In re 2003 QAP*, 848 A.2d at 14. The court failed to explain why the provision requiring the agency to comply with HUD site selection regulations would not impose a duty on a state or local housing agency to affirmatively further fair housing. *See id.* After all, the HUD site selection regulations focus on both project location and overall composition of sites.

43. 24 C.F.R. § 941.202 (2006).

44. *Id.* § 941.202(b).

45. Appellants’ Brief on Appeal, *supra* note 42, at 40. HUD site selection regulations further state that low-income housing sites cannot be located in a neighborhood of minority concentration “unless (A) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (B)

Furthermore, the requirement of 26 C.F.R. § 1.42-9(a) that units eligible for tax credits must be “rented in a manner consistent with housing policy governing non-discrimination” cannot mean only that owners may not deny housing opportunities to applicants based on race or other characteristics.<sup>46</sup> It would be very difficult, if not impossible, to rent a housing unit “consistent with housing policy governing non-discrimination”<sup>47</sup> if the unit is within an area that basically guarantees that the development will be exclusively used by racial minorities.<sup>48</sup> Thus, in order for a unit to not violate 24 C.F.R. § 941.202, the term “rented” should be interpreted to refer to the whole tax credit transaction, starting from the housing development site selection to the renting.<sup>49</sup>

One recent case addressed this issue of first impression: whether state and local housing finance agencies were bound by the “affirmatively to further” requirement under Title VIII. The court specifically addressed whether the Fair Housing Act’s “affirmatively to further” duty applied to a state or local finance agency’s allocation of the Federal LIHTC program pursuant to its adopted QAP.<sup>50</sup>

In *In re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan* (“*In re 2003 QAP*”),<sup>51</sup> public interest organizations alleged that the New Jersey Housing Mortgage Finance Agency (“HMFA”), the finance agency administering the federal LIHTC program, funded projects pursuant to its newly adopted QAP in urban areas that perpetuated racial segregation.<sup>52</sup> The public interest organizations noted that in the present QAP, HMFA set development priorities that were not congruent with its mandate to affirmatively further fair housing.

The challenge against HMFA actually began with the state housing finance agency’s 2002 QAP; however, while those appeals were pending, the 2003 QAP regulations were proposed.<sup>53</sup> When challenging the 2002 QAP, the public interest organizations alleged that seventy-five percent of LIHTC program tax credits would be funding housing projects in racially segregated areas, only

the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area.” 24 C.F.R. § 941.202(c)(1)(i).

46. Appellants’ Brief on Appeal, *supra* note 42, at 41.

47. 26 C.F.R. § 1.42-9(a).

48. Appellants’ Brief on Appeal, *supra* note 42, at 41.

49. *Id.* (“For a unit to be rented ‘consistent with housing policy governing non-discrimination,’ it must first be sited and constructed in that manner.”). Appellants’ Brief on Appeal, *supra*, provides a good example. “[J]ust as a developer could not construct a non-handicapped accessible unit and claim to be in compliance with civil rights law by affirmatively marketing to handicapped tenants, a developer cannot ignore the racial composition of a neighborhood and claim to be in compliance with Title VIII.” *Id.*

50. *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003 QAP)*, 848 A.2d 1, 6 (N.J. Super. Ct. App. Div.), *cert. denied*, 861 A.2d 846 (N.J. 2004).

51. *Id.*

52. *Id.* at 5.

53. *Id.* at 6.

perpetuating racial segregation as a whole.<sup>54</sup> Although the public interest organizations noted that the changes within the 2003 QAP were somewhat significant, they continued to argue that the 2003 QAP remained unchanged in the most relevant aspect.<sup>55</sup>

The 2003 QAP, like the previous 2002 QAP, made no attempt to award points to proposed development projects that were specifically designed to encourage racial integration.<sup>56</sup> “As it has in the past, HMFA fails to require the collection of data on the racial characteristics of a proposed project and its surrounding area, or any assessment of whether an affirmative marketing plan helped achieve integration.”<sup>57</sup> Thus, the public interest organizations were troubled with the idea that the state housing finance agency made no attempt to affirmatively further fair housing through its QAPs. Furthermore, the public interest organizations stressed that children attending the public schools would suffer a very negative impact on their education and preparation for their adult lives.”<sup>58</sup>

When determining whether HMFA were bound under Title VIII—whether or not HMFA must not only prohibit discrimination but also promote integration—the court first noted that HMFA is a “public housing agency” defined by federal law as “any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage or assist in the development or operation of low-income housing.”<sup>59</sup> The court also cited federal court cases<sup>60</sup> which had addressed the “affirmatively to further” issue and decided that state and local finance agencies were bound under Title VIII. Finally, the court noted the Executive Branch of the government had expressed the belief that state and local housing authorities were obliged to affirmatively further fair housing pursuant to Title VIII. President Clinton had declared that executive agency heads have to take appropriate measures to ensure that all participants in federal housing programs furthered the

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54. *Id.* at 8.

55. Appellants’ Supplemental Letter Brief at 3, *In re 2003 QAP*, 848 A.2d 1 (No. A-109-03T3).

56. *Id.*

57. *Id.* The appellants also noted that the 2003 LIHTC allocations showed the consequences of the 2003 QAP: “it has resulted in no family projects in suburban areas . . .” *Id.*

58. *In re 2003 QAP*, 848 A.2d at 9.

59. *Id.* at 12 (quoting 42 U.S.C. § 1437(a)(b)(6) (2000)).

60. *Wallace v. Chicago Hous. Auth.*, 298 F. Supp. 2d 710, 719 (N.D. Ill. 2003) (finding that the Fair Housing Act and applicable HUD regulations imposed a duty on the city housing authority to act affirmatively to further fair housing); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 73 (D. Mass. 2002) (stating that “[w]hen viewed in the larger context of Title VIII, the legislative history, and the case law, there is no way—at least, none that makes sense—to construe the boundary of the duty to affirmatively further fair housing as ending with the Secretary”); *Reese v. Miami-Dade County*, 210 F. Supp. 2d 1324, 1329 (S.D. Fla. 2002) (stating that the “affirmatively further fair housing” requirement “imposes a binding obligation upon the States”), *aff’d*, 77 F. App’x 506 (11th Cir. 2003).

goals of Title VIII.<sup>61</sup> The court held that the HFMA was bound “affirmatively to further” fair housing, concluding that all HFMA housing development activities, most definitely including the construction of QAPs, were subject to Title VIII obligations.<sup>62</sup>

Once the court concluded that the affirmatively to further fair housing duty was imposed on the state housing agency, the court discussed how the HMFA must satisfy the duty.<sup>63</sup> The court began its analysis by stating that “HMFA’s ‘affirmatively to further’ duty must be defined congruent with its statutory powers.”<sup>64</sup> The court noted that the state finance agency was created in order to ensure that financing was available to construct, rent, and rehabilitate low-income housing structures; to promote the construction, rental, and rehabilitation of low-income housing “so as to increase the number of opportunities for adequate and affordable housing . . . , including particularly New Jersey residents of low and moderate income;”<sup>65</sup> and to help revitalize the urban areas of New Jersey.<sup>66</sup> The court concluded that although the state finance agency should promote racial integration pursuant to its obligation under Title VIII, HMFA had an “overriding mission” to promote the construction, rental, and rehabilitation of low-income affordable housing within the state; HMFA’s obligation under Title VIII should not compromise this goal.<sup>67</sup>

The court backed up its conclusion by asserting that 26 U.S.C. § 42(m)(1)(B) and (C) required the state finance agency to set certain priorities within its adopted QAP that prevented the state housing agency from focusing on racial composition in proposed housing project areas.<sup>68</sup> The court focused on two of the three preference categories, projects serving the lowest-income tenants and those located within qualified census tracts,<sup>69</sup> to conclude that the economic status of the tenants must be the primary focus of the state finance agency. “Title VIII may require the agency to administer its tax credit program so as to achieve a condition in which . . . all races have equal housing-market choices. But

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61. Executive Order No. 12,892, 59 Fed. Reg. 2939 § 5-502 (1994) states that If any executive agency concluded that any person or entity (including any State or local public agency) applying for or participating in, or supervised or regulated under, a program or activity relating to housing and urban development has not complied with this order or any applicable rule, regulation, or procedure issued or adopted pursuant to this order, it shall endeavor to end and remedy such violation by informal means, including conference, conciliation, and persuasion.

62. *In re 2003 QAP*, 848 A.2d at 11.

63. *Id.* at 13.

64. *Id.* at 14.

65. N.J. STAT. ANN. § 55:14K-2(e) (West 2005).

66. *In re 2003 QAP*, 848 A.2d at 14.

67. *Id.* at 15.

68. *See supra* text accompanying note 19.

69. *See supra* note 18 and accompanying text. The other preference category, “projects obligated to serve qualified tenants for the longest periods,” was not discussed by the court. *See* 26 U.S.C. § 42(m)(1)(B)(ii)(II) (2000).

achievement of that goal, by focusing primarily on the racial composition of a relevant housing locale, may compromise HMFA's fundamental mission."<sup>70</sup> The court finally pointed to the changes within the 2003 QAP which "expands the potential" for tax credits to be awarded to housing projects within non-minority areas.<sup>71</sup>

Thus, although the court did agree with the public interest organizations when holding that the state finance agency is required by Title VIII to promote integration through its QAP, the court also concluded that the state finance agency, in light of other statutory obligations, did administer low-income housing tax credits through its QAP in a manner that did *not* frustrate the goals of Title VIII.<sup>72</sup> The state finance agency was not ordered to take into account race or segregation when determining to which proposed developments to allocate tax credits. According to the court's decision, the state finance agency, because of its "overriding" mission to focus on the construction and rehabilitation of low-income housing, could fund housing "exclusively in the most troubled and racially-segregated neighborhoods in the state."<sup>73</sup>

The court, of course, never said that the Title VIII obligation is exclusive of the other statutory obligations that the state housing agency must follow. But the overall tone of the court's decision reflects the court's belief that it was unrealistic for the state housing agency to focus on racial integration and still succeed in fulfilling its other statutory obligations.<sup>74</sup> In fact, the court stated that "[t]he promotion of racial integration may be a desirable *by-product* of HMFA's exercise of these [other statutory] duties."<sup>75</sup> By using the term "by-product,"<sup>76</sup>

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70. *In re 2003 QAP*, 848 A.2d at 15.

71. *Id.* at 16. The court noted that HMFA has "recognized the need for the revision by acknowledging 'a growing chasm forming between suburbs and cities . . .'" *Id.* However, no family projects resulted in suburban areas as a result of the 2003 QAP. *See supra* note 57.

72. *In re 2003 QAP*, 848 A.2d at 15.

73. Petitioners' Brief in Support of Petitioners' Motion for Reconsideration of the Court's October 21, 2004 Denial of Petitioners' Petition for Certification at 3-4, *In re 2003 QAP*, 848 A.2d 1 (No. A-109-03T3) [hereinafter Petitioners' Brief]. The public interest organizations noted that not only is the state finance agency allowed to exclusively fund housing in the most racially segregated and troubled neighborhoods within the state but that the state finance agency actually *did* fund low-income housing only in racially-segregated neighborhoods. *Id.* at 4.

74. *See supra* text accompanying note 67. The court did not seem to believe that the obligation imposed under Title VIII and the other statutory obligations of the state housing agency were on equal footing. *In re 2003 QAP*, 848 A.2d at 15. The court was worried that if the state housing agency directed its efforts toward achieving racial integration, it could "compromise" the state housing agency's other statutory obligations. *Id.* The court never expressed concern that focusing on the other statutory obligations could impair a state housing agency's ability to fulfill its obligations under Title VIII. *Id.*

75. *In re 2003 QAP*, 848 A.2d at 15 (emphasis added).

76. The term by-product is defined as "a secondary and sometimes unexpected consequence." *See* Dictionary.com, <http://dictionary.reference.com/search?q=by-product> (last visited May 19, 2006).

the court placed very little importance on the state housing agency's obligation to affirmatively further fair housing pursuant to Title VIII.<sup>77</sup>

The *In re 2003 QAP* decision is not consistent with prior caselaw addressing situations in which a possible conflict with the Title VIII obligation to affirmatively further fair housing and other statutory obligations may occur. In *Project B.A.S.I.C. v. Kemp*,<sup>78</sup> the court noted that although "HUD . . . has an obligation to generally meet low-income housing needs,"<sup>79</sup> "desegregation is not the only goal of national housing policy,"<sup>80</sup> and HUD cannot "avoid its affirmative duty under the Fair Housing Act."<sup>81</sup> The court relied on *Otero* in order to stress that the duty imposed by Title VIII requires a housing authority to truly recognize and act upon its obligation to promote integration even though it has other statutory obligations with which to deal.<sup>82</sup>

A state housing agency's obligation under Title VIII should be met in conjunction with its other statutory obligations.<sup>83</sup> Thus, although the *In re 2003 QAP* court correctly held that a state housing agency also was bound by Title VIII to affirmatively further fair housing, the court placed a stamp of approval on the state housing agency's minimal effort to promote integration, leaving one to believe that the "affirmatively to further" fair housing mandate was meaningless to the court. After all, the court approved the 2003 QAP even though the "predominant focus [was] still on the allocation of tax credits to the urban areas."<sup>84</sup> The public interest organizations rightfully note that "[t]he decision is

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77. By using the term "by-product," the court ignored the state finance agency's obligation to "affirmatively" further fair housing or, in other words, promote integration. See *supra* text accompanying notes 27-28.

78. 776 F. Supp. 637, 643 (D.R.I. 1991).

79. *Id.* at 642.

80. *Id.*

81. *Id.* at 643.

82. *Id.* "Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973).

83. Appellants' Brief on Appeal, *supra* note 42, at 42. For example, "[a]ppellants contend that the preference given to qualified census tracts must be read in *pari materia* with Title VIII." *Id.* (underlining omitted). *In pari materia* is "a canon of construction that statutes [on the same subject] may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." BLACK'S LAW DICTIONARY 352-53 (2d pocket ed. 2001). Therefore, "[c]onsistent with the basic canons of statutory construction, an appropriate analysis must examine both the Fair Housing Act and the LIHTC authorizing statute to determine the manner in which the Fair Housing Act's requirements can be met within the specific framework of the LIHTC." Brief of Amici Curiae in Support of Granting Certification Based upon the Presence of a Question of General Public Importance that Should Be Settled by the Supreme Court at 14, *In re 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003 QAP)*, 848 A.2d 1 (N.J. Super. Ct. App. Div.) (No. 1A-109-03T3), *cert. denied*, 861 A.2d 846 (N.J. 2004).

84. *In re 2003 QAP*, 848 A.2d at 6; see also *supra* note 57.

a dangerous precedent nationally, especially in view of other states' perception of New Jersey's progressive housing jurisprudence and because this is the first case of its type in the nation."<sup>85</sup>

### III. RACE-BASED REMEDIES WITHIN QAPS

The public interest organizations have much to worry about because racial and ethnic segregation is a national problem; the situation in New Jersey is far from unusual. "The lack of civil rights controls in the LIHTC program" has led to serious racial segregation in many states throughout the country.<sup>86</sup> In other words, allocation of tax credits pursuant to QAPs is not being used to promote integration in the segregated parts of the country.<sup>87</sup> "In 1996, for instance, an independent audit showed that, in cities, half the apartments built through the tax credit program have been in minority neighborhoods."<sup>88</sup> Unfortunately, not much has changed since then. "A more recent study by . . . a public interest law firm[], has shown that low-income housing tax credit projects in that city have concentrated blacks and Latinos in historically black and Latino neighborhoods, and particularly in the poorest communities."<sup>89</sup> The impact of the New Jersey decision could potentially lead other courts faced with challenges against housing agency QAPs to also render the Title VIII obligation insignificant, thus allowing the perpetuation of racial segregation to continue within low-income housing communities.

But what are courts to do? After all, how can state housing agencies' other statutory obligations be reconciled with Title VIII obligations? As stated earlier, state housing agencies have been given minimal direction when developing their QAPs, and none of this guidance actually helps state housing agencies comply with Title VIII. "The Department of Treasury's failure explicitly to require compliance with fair housing policy is accompanied by specific competing incentives in the LIHTC statute that promote low income housing development in 'qualified census tracts,' which are often the poorest census tracts in a jurisdiction."<sup>90</sup> The other priorities do not focus on the racial composition of tenants; thus, it is not surprising that state housing agencies have concentrated all of their efforts on serving the poor without consideration of promoting racial integration. After all, "[t]he LIHTC statute fails to give direction as to how much priority to assign these . . . goals, or how to reconcile them with the compelling

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85. Petitioners' Brief, *supra* note 73, at 67.

86. POVERTY & RACE RESEARCH ACTION COUNCIL, CIVIL RIGHTS MANDATES IN THE LOW INCOME HOUSING TAX CREDIT (LIHTC) PROGRAM 1 (2004), <http://www.prrac.org/pdf/crmandates.pdf> [hereinafter PRRAC]. "Evidence also suggests that this concentration [of minorities] is even more pronounced when multifamily LIHTC projects are distinguished from those designated for elderly use." *Id.* at 2.

87. Neuwirth, *supra* note 10, ¶ 30.

88. *Id.*

89. *Id.*

90. PRRAC, *supra* note 86, at 1.

goal[] of . . . racial integration mandated by the Fair Housing Act.”<sup>91</sup> The seemingly obvious solution to this problem would be to require state housing agencies to incorporate some sort of race-based classification within their QAPs when determining which proposed housing sites will be awarded tax credits.

However, the *In re 2003 QAP* court addressed this issue of race as a factor within QAPs and agreed with the state housing agency that a “race-based remedy” would likely be struck down on equal protection grounds.<sup>92</sup> Government imposed race-based classifications are always subject to strict scrutiny.<sup>93</sup> Thus, the classification will be held valid only if it is narrowly tailored to effectuate a compelling governmental interest.<sup>94</sup>

The *In re 2003 QAP* court noted that “[i]n the housing context, federal courts have held that the ‘affirmatively to further’ obligation of Title VIII will not save race-based quota systems from equal protection scrutiny even if they were designed to promote integration.”<sup>95</sup> In *United States v. Starrett City Associates*,<sup>96</sup> an apartment complex used racial quotas when accepting or denying rental applicants. The apartment complex claimed that under *Otero* it was obligated affirmatively to promote racial integration and that using the racial quotas helped prevent “white flight” within the communities.<sup>97</sup>

Although the *In re 2003 QAP* court did not determine whether the apartment complex was run by state actors and thus was under an obligation to affirmatively further fair housing, the court found that even if state actors were involved, “the racial quotas and related practices employed . . . to maintain integration violate the antidiscrimination provisions of the Act.”<sup>98</sup> The court further explained that “while quotas promote Title VIII’s integration policy, they contravene its antidiscrimination policy, bringing the dual goals of the Act into conflict.”<sup>99</sup>

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91. *Id.* “[T]he tax credit statute itself encourages developers to apply for allocations . . . for areas which are likely to be areas of minority concentration.” Roisman, *supra* note 8, at 1043.

92. *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003 QAP)*, 848 A.2d 1, 16 (N.J. Super. Ct. App. Div.), *cert. denied*, 861 A.2d 846 (N.J. 2004). “[Prior caselaw] do[es] lend substance to HMFA’s concern that criteria that are primarily race-based, may be constitutionally vulnerable, and may run counter to its statutory duty . . .” *Id.* at 17.

93. *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *see also* *Grutter v. Bollinger*, 539 U.S. 306 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 265 (1978) (stressing that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination”).

94. *Grutter*, 539 U.S. at 326.

95. *In re 2003 QAP*, 848 A.2d at 17.

96. 840 F.2d 1096 (2d Cir. 1988).

97. *Id.* at 1100. The apartment complex used the testimony of housing experts to explain the phenomena of “white flight” and “tipping.” It was described as a situation “in which white residents migrate out of a community as the community becomes poor and the minority population increases, resulting in the transition to a predominantly minority community.” *Id.* at 1099.

98. *Id.* at 1101.

99. *Id.*

However, the court did not hold that all race-based classifications within the housing context would be struck down as violating the anti-discrimination provisions of Title VIII. The court deemed certain characteristics of race-based housing practices to be more acceptable than others, setting forth "a framework for examining the affirmative use of racial quotas under the Fair Housing Act."<sup>100</sup> Basically, racial distinctions within the housing context should be temporary with a "defined goal as its termination point"<sup>101</sup> and "should be based on some history of racial discrimination."<sup>102</sup> Furthermore, the court made a distinction between the acceptable quota systems "designed to increase or ensure minority participation"<sup>103</sup> with the less acceptable quota systems "designed to maintain integration by limiting minority participation."<sup>104</sup>

Although the *Starrett* court did not engage in an equal protection strict scrutiny analysis, it did seem to suggest that racial quotas utilizing the more acceptable characteristics would be more likely to pass strict scrutiny on equal protection grounds than those with less acceptable characteristics. Because the quota system used by the apartment complex in the *Starrett* case lacked any of the favorable characteristics, the quota system was struck down as violative of Title VIII's anti-discriminatory policy. However, the court made certain to clarify that it did "not intend to imply that race is always an inappropriate consideration under Title VIII in efforts to promote integrated housing."<sup>105</sup>

As in *Starrett*, the court in *United States v. Charlottesville Redevelopment & Housing Authority*<sup>106</sup> determined that a public housing tenant selection policy that favored white applicants in order "to achieve a 50/50 mix of black and white residents" was also violative of the anti-discrimination provisions of the Fair Housing Act.<sup>107</sup> The court agreed that the housing authority was under a duty to integrate but determined that the method which the housing authority imposed was "legally impermissible."<sup>108</sup> The court noted that the promotion of integration is as important as the avoidance of discrimination; however, the court further observed that there will be times when the two policies of the Fair Housing Act will come into conflict.<sup>109</sup> In those cases, the court proclaimed that "the duty to

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100. *Id.*

101. *Id.*

102. *Id.* at 1102.

103. *Id.*

104. *Id.*

105. *Id.* at 1103.

106. 718 F. Supp. 461 (W.D. Va. 1989).

107. *Id.* at 462.

108. *Id.* at 463.

109. *Id.* at 467. The court clarified that it did not "ascribe[] to integration a status inferior to nondiscrimination in the pantheon of legal values." *Id.* at 468. However, the court explained that the duties to prohibit discriminatory practices and promote integration will inevitably clash at times. *Id.* "These legal values of nondiscrimination and integration are like the moral values which spawned them in that the two principles are not either necessarily or always fully congruent." *Id.* at 467.

avoid discrimination must circumscribe the specific particular ways in which a party under the duty to integrate can seek to fulfill that second duty.”<sup>110</sup> Although the court struck down this particular race-conscious housing policy, it relied on *Starrett* when stating that not all race-based classification aimed at promoting integration within housing would be struck down. “A race-conscious preferential policy could survive legal scrutiny if it is narrowly tailored, remedial in character, and temporary in duration.”<sup>111</sup>

It is important to look at cases in which affirmative race-conscious housing plans aimed at promoting integration have survived equal protection or Title VIII challenges.<sup>112</sup> In *South-Suburban Housing Center v. Greater South Suburban Board of Realtors*, the Seventh Circuit held that a race-conscious marketing plan did not violate the anti-discriminatory provisions of the Fair Housing Act.<sup>113</sup> The affirmative marketing plan, in order to maintain the integrated state of the neighborhood, required that real estate agents bring the availability of homes within the neighborhood to the attention of white purchasers. However, the marketing plan in no way deterred or delayed black purchasers from pursuing their interests in the homes or prohibited real estate agents from showing homes to potential black purchasers.<sup>114</sup> The court concluded that the case was distinguishable from both *Starrett* and *Charlottesville* in that it was “not dealing with conflicting goals [of prohibiting discrimination and promoting integration], for the affirmative marketing plan furthers the goal of integration while providing equal opportunities to all.”<sup>115</sup>

Thus, although the *In re 2003 QAP* court was correct in stating that a race-based remedy within a QAP would subject such a provision to strict scrutiny, the court should have provided some guidance to the state housing agency as to what sort of race-based remedy would be permissible. Instead, the court focused on cases in which race-conscious housing plans had been struck down because of their poor construction instead of cases in which race-conscious housing plans were constitutionally and statutorily permissible.

The court should have guided the state housing agency to find ways to encourage “project siting that avoid[ed] perpetuation of segregation and further[ed] fair housing goals.”<sup>116</sup> For example, a QAP could award more points or give preference to developers of low-income housing in predominantly white communities that are committed to affirmative marketing to attract minorities and *also* to developers of low-income housing in predominantly minority areas

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110. *Id.* at 468.  
111. *Id.* at 469.  
112. See, e.g., *Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998); *South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868 (7th Cir. 1991); see also Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395.  
113. *South-Suburban*, 935 F.2d 868.  
114. *Id.* at 873.  
115. *Id.* at 883.  
116. PRRAC, *supra* note 86, at 4.

committed to affirmative marketing to attract white purchasers.<sup>117</sup> It seems as though race-based remedies would be relatively easy to incorporate within QAPs, thus allowing state housing agencies to accomplish the Title VIII mandate of promoting integration. On the other hand, state housing agencies, like the HMFA, are hesitant to make racial classifications within their QAPs because of the sensitive nature of such classifications and the possible (and probable) challenges to the QAP that would arise.<sup>118</sup> Thus, it is unlikely that state housing agencies will take it upon themselves to use race-based remedies for fear of being challenged; furthermore, the *In re 2003 QAP* case has shown that courts may be unwilling to compel state housing agencies to incorporate race as a factor within their QAPs.

However, ignoring the need for some sort of factor within QAPs that would allow the promotion of integration would be highly problematic. Currently, racially segregated urban areas in which low-income housing is located are subject to a variety of social ills, including poverty.<sup>119</sup> “[W]ith high rates of poverty come a variety of other social and economic conditions: reduced buying power, increased welfare dependence, high rates of family disruption, elevated crime rates, housing deterioration, elevated infant mortality rates, and decreased educational quality.”<sup>120</sup> Furthermore, urban revitalization is not the answer to curing these social issues. “Government . . . programs to assist the poor and revitalize inner-city areas, though well-intentioned . . . have limited success at best. Often, such programs unintentionally maintain the status quo, a politically comfortable arrangement that leaves the neediest people confined to the inner city.”<sup>121</sup> Not surprisingly, studies which allowed families to move from high-poverty inner city areas to low-poverty areas resulted in a great number of benefits for the families involved including “significant improvements in safety, child and parent physical and mental health, as well as youth delinquency and behavior problem [sic].”<sup>122</sup> Thus, not only is there a legal mandate by Title VIII

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117. *Id.* (suggesting numerous other ways in which state housing agencies can promote racial integration through their QAPs).

118. *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003 QAP)*, 848 A.2d 1, 17 (N.J. Super. Ct. App. Div.), *cert. denied*, 861 A.2d 846 (N.J. 2004). The court noted that “mayors of inner cities or developers in urban areas may argue that emphasis on race-based selection criteria violates the equal protection clause by discriminating against minorities, or at the very least that such criteria would have a disparate impact on minorities in violation of Title VIII.” *Id.* at 18.

119. See MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* 70 (2002).

120. Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 AM. J. SOC. 329, 342 (1990).

121. ORFIELD, *supra* note 119. “In a recent study of the effects of several of the country’s largest and most successful inner-city focused antipoverty initiatives, family and individual poverty rates substantially increased . . .” *Id.* at 82.

122. Alessandra Del Conte & Jeffrey Kling, *A Synthesis of MTO Research on Self-Sufficiency, Safety and Health, and Behavior and Delinquency*, POVERTY RESEARCH NEWS, Jan.-Feb. 2001, at

that compels state agencies to promote integration through their QAPs, there are also current serious policy concerns that command racial integration. These are the same policy concerns that were noted by those who enacted Title VIII<sup>123</sup>; unfortunately not much has improved in the area of racial segregation within low-income housing since the passage of Title VIII. Therefore, it is important to ask whether there are any other factors which could be included within QAPs that would serve the purpose of promoting integration pursuant to Title VIII and also evade equal protection or Title VIII anti-discriminatory provision challenges.

#### IV. QUALITY OF SCHOOLS AS A FACTOR WITHIN QAPs

Finding a factor that awards more points to housing developments that is not a race-based classification but somehow effectively promotes integration is difficult. After all, a quality of such a factor would have to be strongly correlated with race in order to achieve integration within low-income housing communities. In other words, if more points are given to proposed housing development sites that include this non race-based classification factor within their QAPs, a definite consequence should be racial integration, regardless of the fact that race was not considered. Therefore, those opposed to proposed low-income housing sites could not challenge the state agency's QAP on equal protection grounds or Title VIII anti-discriminatory provision grounds because the included factor would encourage racial integration without using a racial classification. Including the quality of schools within a QAP, due to the strong correlation between high minority schools and low performance, may be the most effective manner in which to achieve integration but also to shield state agencies from costly court challenges.

Low-income housing sites for families are often located within minority neighborhoods.<sup>124</sup> "In urban areas, where the bulk of the federal tax credits are used, developers most often build family housing, which tends to be overwhelmingly occupied by poor black and Latino families, thus further concentrating poverty."<sup>125</sup> On the other hand, tax credits are used by developers in suburban and rural areas to build elderly housing developments which are occupied mostly by white residents.<sup>126</sup> This pattern of placing low-income family housing developments within high minority populated communities has affected

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6, available at <http://www.nber.org/~kling/synthesis.pdf>. The Moving to Opportunity Program ("MTO") is a "project [which] ultimately tests the assumption that neighborhood has an effect on the health and well-being of its residents, and moving to higher-income neighborhoods will improve opportunities for families;" thus, the program "encourages families living in public housing to move to lower poverty neighborhoods with the help of vouchers to pay for housing." Joint Center for Poverty Research, *In This Issue: Moving to Opportunity*, [http://www.jcpr.org/newsletters/vol5\\_no1/this\\_issue.html](http://www.jcpr.org/newsletters/vol5_no1/this_issue.html) (last visited May 19, 2006).

123. See *supra* notes 28-29 and accompanying text.

124. See *supra* text accompanying notes 86-89.

125. Neuwirth, *supra* note 10, ¶ 2.

126. *Id.*

the schools within those communities. Specifically, “[r]acially separate housing patterns [have] perpetuate[d] segregated schools.”<sup>127</sup> This is an understandable consequence as the majority of children living in racially segregated urban communities with low-income housing developments are minorities; thus, the proximate schools to these urban communities are populated by mostly minority students.

However, a state agency cannot use the racial composition of a school as a factor within its QAP without being subject to possible court challenges. In other words, awarding more points to a proposed housing development site that is near a more racially integrated school versus a more segregated school would still be prone to the same challenges faced by any racial classification.<sup>128</sup> It is important to examine whether there exists among these segregated schools a common characteristic that can be used by state agencies as a factor within their QAPs.

Unfortunately, the common characteristic between these segregated schools is the daily exposure of the many minority students residing in the area to a failing educational system. Simply put, “[s]egregated schools provide diminished learning opportunities.”<sup>129</sup> Regrettably, this is an assertion that can hardly be contested. “A wealth of research also shows that students educated in economically and racially segregated schools receive substandard educations. When a large number of students in a school face these challenges, the cumulative effect is that the ability of the school to provide a quality education is significantly impeded.”<sup>130</sup>

A main reason that segregated minority schools are substandard is because of “the link between segregation by race *and* poverty.”<sup>131</sup> Thus, low-income

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127. Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 71 (2002).

128. This is not to say that utilizing such a factor within a QAP is discouraged. As stated earlier, race-based classifications can survive equal protection and Title VIII anti-discriminatory challenges if constructed in a proper manner. However, state agencies that are wary of race-based classifications due to the probability of court challenges will not benefit from using the racial composition of a school as a factor within their QAPs.

129. Ware, *supra* note 127, at 71; *see also* Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 420 (2004) (“[W]e . . . face a concentration of poverty in our inner cities and in our low income housing developments, which has brought with it . . . poor education . . .”); Massey, *supra* note 120, at 350 (stressing that “the concentration of poverty in neighborhoods inevitably concentrates deprivation in schools”). *See generally* John A. Powell, *Opportunity-Based Housing*, 12-WTR J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 188 (2003).

130. Powell, *supra* note 129, at 198. “[I]t is inevitable that racial segregation in the public schools has devastating implications for the education environment. Racially segregated schools more often rely upon transitory teachers and have curricula with greater emphasis on remedial courses, higher rates of tardiness and unexcused absence, and lower rates of extracurricular involvement.” *Id.* at 199.

131. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE?*, at 21 (2004), available at <http://www>.

housing developments placed in urban segregated minority communities perpetuate segregation by race and also poverty, leading to segregation by race and poverty within the proximate schools. Unfortunately, concentrated poverty in schools leads to lower achievement levels, schools lacking resources, high turnover rates of teachers, and many more educational disadvantages for students.<sup>132</sup> Students attending racially integrated or segregated white schools are not likely to experience such educational disadvantages.

Many scholars rightfully believe that fixing racial segregation within the housing context through the promotion of integration would eventually remedy the segregation problems evident in today's schools.<sup>133</sup> A study by the Harvard Civil Rights Project of school segregation proposed using "housing subsidy programs more effectively to provide low income families access to middle class schools"<sup>134</sup> and implementing "plans that reward communities and metro areas that work to provide subsidized and affordable housing in suburbs and gentrifying areas."<sup>135</sup> Because of the difficulty in achieving residential integration, scholars are looking for new and innovative ideas that will lead to integration within housing and the schools located nearby. "We must think and act creatively to use affordable housing as a tool to ensure that every family has an opportunity to live in a community that has high-quality schools."<sup>136</sup>

One possible consideration is to use the current failing segregated school system as the catalyst for improving low-income housing residential segregation. This, in turn, would lead to integration within the schools. Because the correlation between high minority populated schools and low performance or quality of those schools has been established, it would seem reasonable to have state agencies award more points to proposed housing development sites that will be located in proximity to better performing, higher quality schools.

After all, it is most likely that higher quality schools, which are most often segregated white schools or racially diverse schools, will be located in low-poverty concentrated areas.<sup>137</sup> Because of the correlation between high

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civilrightsproject.harvard.edu/research/reseg04/brown50.pdf (emphasis added). "Only 15 percent of . . . intensely segregated white schools were schools of concentrated poverty . . . . In contrast, 88 percent of the intensely segregated minority schools . . . had concentrated poverty . . . ." *Id.* at 21. The study concluded that "students in highly segregated neighborhood schools are many times more likely to be in schools of concentrated poverty." *Id.*

132. *Id.* at 21-22.

133. See Wade Henderson & Judith A. Browne, *Building Housing and Communities Fifty Years after Brown v. Board of Education*, 13-SUM J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 437, 441 (2004) ("[I]f we fix our housing dilemma, we will ultimately have a chance to live out the promise of Brown."); see also Powell, *supra* note 129, at 189 ("Accessing stable, affordable housing in a vibrant area contributes greatly to improvements in other key life areas, such as . . . education . . .").

134. ORFIELD & LEE, *supra* note 131, at 40.

135. *Id.* at 41.

136. Henderson & Browne, *supra* note 133, at 441.

137. See *supra* note 131 and accompanying text.

concentrations of poverty and race, developers will be encouraged to seek out sites that are outside of the high-minority urban inner cities in order to gain more points. And because concentration of low-income housing within urban areas has been a significant factor in perpetuating racial segregation, moving sites out of urban areas can only ameliorate the current situation.<sup>138</sup>

Thus, including the quality of schools within a state housing agency's QAP may promote integration within housing. In order to figure out how to effectively include school performance within a QAP, an examination of current state housing agency QAPs is necessary. An evaluation of the various state housing agency QAPs demonstrates that a clear majority of state housing agencies do not currently take into account school performance when allocating tax credits to low-income housing developers.<sup>139</sup> In general, state housing agency QAPs award most points to proposed low-income housing sites on criteria such as the type of construction, rent affordability, size of project, location within qualified census tracts, etc. Although each QAP differs in the amount of points given to each project characteristic, the list of criteria for which points are awarded remains relatively similar.<sup>140</sup> Many of the QAPs do mention schools; however, almost all of the QAPs award points for proximity to schools and not for the quality of schools within the area.<sup>141</sup>

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138. See *supra* text accompanying notes 86-89.

139. Novodrac & Co. LLP, QAPs and Applications, <http://www.novoco.com/QAP.shtml> (last visited May 19, 2006). State housing agency 2005 final QAPs were evaluated for the following states: Alaska, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming. Due to the unavailability of final QAPs for several states, state housing agency 2005 draft QAPs were evaluated for the following states: Alabama, Arizona, Delaware, Illinois, Massachusetts, Mississippi, and South Carolina. Due to the unavailability of a 2005 final QAP or draft QAP, a tax credit application form for Connecticut was evaluated. Finally, due to the unavailability of 2005 final or draft QAPs or 2005 tax credit applications, the following state agencies were not evaluated: Florida, Maryland, North Dakota, Utah, Vermont, and West Virginia.

140. For example, the Arkansas Development Finance Authority allocates four points for projects that "[e]xtend[] the duration of low-income use." ARKANSAS DEVELOPMENT FINANCE AUTHORITY, HOUSING CREDIT PROGRAM 2005 QUALIFIED ALLOCATION PLAN 19 (2004), available at [http://www.novoco.com/QAP\\_Applications/Arkansas\\_final\\_05.pdf](http://www.novoco.com/QAP_Applications/Arkansas_final_05.pdf). However, the Iowa Finance Authority awards zero to twenty points to "[p]rojects obligated to serve qualified tenants for additional years beyond the minimum . . . required . . . ." IOWA FINANCE AUTHORITY, LOW-INCOME HOUSING TAX CREDIT PROGRAM 2005 QUALIFIED ALLOCATION PLAN 21 (2004), available at [http://www.novoco.com/QAP\\_Applications/Iowa\\_final\\_05.pdf](http://www.novoco.com/QAP_Applications/Iowa_final_05.pdf). Of course, it is important to note that one point may carry more weight under a particular state housing agency's point system than another state housing agency's point system.

141. For example, the Georgia Housing and Finance Authority awards points for desirable characteristics, including proximity to schools. GEORGIA HOUSING AND FINANCE AUTHORITY, 2005 QUALIFIED ALLOCATION PLAN FOR LOW INCOME HOUSING TAX CREDITS 65 (2005), available at

One QAP, however, did stand out from the rest. The Texas Department of Housing and Community Affairs awards points for proposed low-income housing development sites that are “to be located in an elementary school attendance zone of an elementary school that has an academic rating of ‘Exemplary’ or ‘Recognized,’ or comparable rating if the rating system changes.”<sup>142</sup> This is a considerable change from the 2004 QAP which did not award any points for proposed low-income housing sites that were to be located near high performing schools.<sup>143</sup> Although this is a step in the right direction, the Texas 2005 QAP actually lists “an elementary school attendance zone of an elementary school that has an academic rating of ‘Exemplary’ or ‘Recognized[.]’” as one of eight development locations for which an applicant can receive points.<sup>144</sup> The applicant is awarded four points if the proposed low-income housing developments qualifies as one of the listed development locations. Unfortunately, if the applicant’s proposed low-income housing site qualifies for more than one of the development locations, the applicant is not awarded additional points, as four points is the maximum amount awarded under this criterion of development location.<sup>145</sup> Thus, it is questionable whether the particular point system will truly encourage developers to seek out sites that are located near higher quality schools or to just focus on one of the other seven possible development locations.<sup>146</sup> Furthermore, because the Texas 2004 QAP did not include school performance as a criterion, the effect of this inclusion within the Texas 2005 QAP will be unascertainable for some time. Nevertheless, including the quality of schools as a factor in QAPs is a promising means by which to achieve residential desegregation. States can utilize the accountability systems that they have been mandated to develop by the No Child Left Behind Act in order to develop the criteria that would award more points to higher

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[http://www.novoco.com/QAP\\_Applications/Georgia\\_final\\_05.pdf](http://www.novoco.com/QAP_Applications/Georgia_final_05.pdf).

142. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, 2005 HOUSING TAX CREDIT PROGRAM 37 (2005), *available at* [http://www.novoco.com/QAP\\_Applications/Texas\\_final\\_05.pdf](http://www.novoco.com/QAP_Applications/Texas_final_05.pdf).

143. *See* TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, 2004 HOUSING TAX CREDIT PROGRAM 1 (2004), *available at* [http://www.novoco.com/QAP\\_Applications/Texas\\_final\\_04.pdf](http://www.novoco.com/QAP_Applications/Texas_final_04.pdf).

144. *Id.* at 37.

145. *Id.*

146. *See id.* Some of the other listed development locations include

[a] geographical area which is an Economically distressed area; a Colonia; or a Difficult Development Area (DDA) as specifically designated by the Secretary of HUD[;] . . . a designated state or federal empowerment/enterprise zone, urban enterprise community, or urban enhanced enterprise community[;] . . . a city or county-sponsored area or zone where a city or county has, through a local government initiative, specially encouraged or channeled growth, neighborhood preservation, or redevelopment.

*Id.* Thus, it is probable that applicants will choose to focus on the other listed criteria in order to gain the maximum four points; furthermore, these other development locations seem to reward applicants for proposing low-income housing sites in urban areas, perpetuating the cycle of residential segregation.

quality schools.<sup>147</sup>

Including school performance or quality within a QAP would also serve another purpose—fulfilling a state constitutional obligation. “[S]tates generally have an obligation under their constitutions to provide all students with an adequate education.”<sup>148</sup> At least one scholar has stated that challenges based on state constitutional adequate education clauses should be successful for a number of reasons.<sup>149</sup> First, those challenging the adequacy of segregated minority schools, arguing that desegregation is a necessary component in providing an adequate education, “can assert that racial and socioeconomic isolation deprives . . . students of an adequate education,” based on studies “demonstrat[ing] that . . . students who suffer from the dual burdens of racism and poverty are far less likely than their white, middle-class counterparts to attend schools that emphasize academic achievement.”<sup>150</sup> Furthermore, challengers can assert that because desegregation “helps students develop the ability to coexist with persons from different cultures” it is a critical element of an adequate education.<sup>151</sup>

In *In re 2003 QAP*, the four public interest organizations challenging the state housing agency’s adoption of the 2003 QAP also argued that the 2003 QAP violated “sections of the New Jersey Constitution which prohibit segregation of public schools, and require that the Legislature provide a thorough and efficient education.”<sup>152</sup> The court did not accept this argument and instead decided that neither of the two constitutional provisions imposed upon the state agency a duty to allocate tax credits to housing developments in non-urban locations.<sup>153</sup> The court stated that the state agency “has no jurisdiction over public education; [and] its statutory obligation is to administer the tax credit program in a manner consistent with the selection criteria and preferences specified by 26 U.S.C.A. § 42(m).”<sup>154</sup> The court decided that the statutory preferences compel that a substantial portion of tax credits be allocated to urban areas. Finally, the court stated that “it was not . . . unreasonable for HMFA to conclude that better housing in urban areas might facilitate the thorough and efficient education clause. Improved housing in urban areas could enable the children who reside in those housing units to develop a better focus on their scholastic endeavors.”<sup>155</sup>

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147. 20 U.S.C. § 6311(b)(2)(A) (Supp. I 2001) states that “[e]ach State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress . . . .”

148. Powell, *supra* note 129, at 214.

149. Preston Cary Green III, *Can State Constitutional Provisions Eliminate De Facto Segregation in the Public Schools?*, 68 J. NEGRO EDUC. 138, 151 (1999).

150. *Id.*

151. *Id.*

152. *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003 QAP)*, 848 A.2d 1, 17 (N.J. Super. Ct. App. Div.), *cert. denied*, 861 A.2d 846 (N.J. 2004).

153. *Id.* at 21.

154. *Id.*

155. *Id.* The court further noted “that substandard housing is one of many socio-economic

The court's logic is flawed. Because the HMFA is a state agency run by state actors, it is bound by the New Jersey State Constitution.<sup>156</sup> Thus, the HMFA must take into consideration the quality of education when allocating tax credits to high-minority urban areas of New Jersey. The question is not whether the HMFA has jurisdiction over public education. It is whether the HMFA, by allocating tax credits, is contributing to segregation within the schools. As stated earlier, placing low-income housing developments in high-minority, poverty concentrated areas exacerbates segregation overall and within the nearby schools.<sup>157</sup> The strong connection between residential minority segregation within inner cities and the poor quality of education is undeniable.<sup>158</sup> By significantly contributing to racial segregation within the schools and, thus, to the diminishing quality of education provided by such schools, HMFA is violating the New Jersey State Constitution. Furthermore, New Jersey Supreme Court cases reflect clear policy goals regarding racial segregation and its effect on the quality of education.<sup>159</sup> The allocation of tax credits in a manner that perpetuates segregation within the schools and, thus, diminishes the quality of education provided to the children who attend those schools defeats those clearly stated policy goals.

If state housing agencies make an effort to include the quality of schools within their QAPs, the state housing agencies would be complying, at least on some level, with constitutional educational clauses that promise an adequate education to all children, regardless of race or economic status. The allocation of tax credits to poverty-stricken, high minority areas would decrease, would lead to desegregation within the schools, and would improve the quality of education overall. Thus, two compelling arguments exist for state housing agencies to include the quality of schools within their QAPs. First, because quality of schools is not a race-based classification, a state agency can include it as a factor within its QAP without being subject to equal protection or Title VIII anti-discriminatory challenges and still achieve the Title VIII mandate to promote integration. Second, by considering quality of schools as a factor when deciding how to allocate tax credits, state housing agencies will fulfill their obligations to

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conditions that impairs educational achievement" and that "[i]t would be contradictory and self-defeating to direct financing away from urban areas when the Court has ordered a massive infusion of public tax money to improve public education in urban areas." *Id.* at 21-22.

156. Appellants' Brief on Appeal, *supra* note 42, at 76.

157. *See supra* text accompanying notes 124-27.

158. *See supra* text accompanying notes 129-31; *see also* Appellants' Brief on Appeal, *supra* note 42, at 77 (describing the state agency's allocation of tax credits as a "perpetuation of segregation in a manner that keeps poor minority children trapped in our state's worst schools").

159. *See Abbott v. Burke*, 575 A.2d 359, 411 (N.J. 1990) (stating that "[o]ur large black and hispanic population is more concentrated in poor urban areas and will remain isolated from the rest of society unless this educational deficiency in poorer urban districts is addressed"); *see also* *Booker v. Bd. of Educ. of Plainfield*, 212 A.2d 1, 6 (N.J. 1965) (stressing that "heterogeneous student populations" are educationally advantageous and that "states may not justly deprive the oncoming generation of the educational advantages which are its due").

comply with state constitutional education clauses.

#### CONCLUSION

Current housing policies must change in order to effectuate integration within our nation's communities. State agencies that administer the largest federal subsidy program for low-income housing play an integral role in shaping the racial (and economic) composition of urban and suburban America. Although mandated by Title VIII to promote integration, state housing agencies have made little progress in the area; in fact, current court challenges have brought to light the impact of state agency planning in perpetuating segregation. State agencies may be hesitant to make racial classifications within their QAPs because of possible equal protection or Title VIII anti-discriminatory challenges. Therefore, state agencies should use quality of schools as a factor in determining how to allocate tax credits in order to effectively promote integration and also comply with state constitutional educational clauses.

















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